75-1712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1712

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

DANIEL M. GABY,

Appellant,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, JAMES C. KELLOGG, III, HOYT AMMIDON, GUSTAVE L. LEVY, JAMES G. HELLMUTH, ANDREW C. AXTELL, WILLIAM J. RONAN, W. PAUL STILLMAN, WALTER H. JONES, BERNARD J. LASKER, PHILIP B. HOFMANN, and JERRY FINKELSTEIN, Commissioners of the Port of New York Authority, AUSTIN J. TOBIN, Executive Director of the Port of New York Authority, and WILLIAM T. CAHILL, Governor of the State of New Jersey,

Appellees,

and

UNITED STATES TRUST COMPANY OF NEW YORK,

Intervenor.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

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Dated: May 1976

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the New Jersey Supreme Court is reported at 69 N.J. 253, 353 A. 2d 514 and appears herein as Appendix A. The trial court's opinion rendered in the Superior Court of New Jersey, Law Division, is reported at 134 N.J.Super. 124, 338 A. 2d 833 and appears herein at Appendix B.

Jurisdiction

These consolidated actions involve the validity of certain statutes enacted by the Legislature of the State of New Jersey, which acts are alleged to be in violation of the Constitution of the United States. Judgment upholding the validity of the state statutes was entered by the Supreme Court of New Jersey on February 25, 1976. Appeal is made to this Court pursuant to 28 U.S.C. 1257 (2). *Cohen* v. *California,* 403 U. S. 15, reh. den. 404 U.S. 876 (1971), *Warren Trading Post Co.* v. *Arizona State Tax Commission,* 380 U.S. 685 (1965).

Questions Presented

Whether N.J.S. 32:1-35.55, enacted in 1962, a covenant with holders of certain bonds issued by the Port Authority that the Authority was, in effect, to make funds unavailable for mass transit use, constitutes a violation of U.S.Const. Art. I, Sec. 10, Cl. 3 in that it represents an interstate compact not ratified by or consented to by the Congress.

Statement of Facts

The litigation was commenced by the filing of a class action complaint by the plaintiff, Daniel Gaby, on May 16, 1972. The principal relief sought was a declaratory judgment that Chapter 8 of the Laws of 1962, N.J.S.A. 32:1-35.50 (the 1962 Covenant) violated the Federal and State Constitutions. The 1962 legislation authorized the construction of the World Trade Center and the acquisition of the Hudson and Manhattan Railroad Company by the Port Authority and, except in certain limited circumstances, precluded the States of New York and New Jersey from applying the Authority's revenues and reserves for passenger railroad purposes. It was agreed that the United States Trust Company should be permitted to intervene in the Gaby action on behalf of the bondholders.

On April 30, 1974, legislation repealing the 1962 Covenant was signed into law. The United States Trust Company instituted a separate action on behalf of itself and the bondholders naming the State of New Jersey, the Governor, an the Attorney General as defendants. In that action U.S. Trust sought declaratory judgment that the repeal violated the Federal and State Constitutions.

The State of New Jersey answered the complaint of U. S. Trust and asserted by answer and counterclaim the validity of the repealer as well as the invalidity of the 1962 Covenant.

On December 10, 1974, the Gaby and U.S. Trust actions were consolidated.

There was a limited trial concerned with narrow factual issues in the U. S. Trust action. All other facts in both actions were stipulated. After oral argument addressed to all issues, the Law Division decided the mat-

ter by written opinion, May 14, 1975. By the terms of that opinion and the judgment which followed, the 1974 repealer was held to be constitutional. The Court declined to decide the constitutionality of the 1962 Covenant. U.S. Trust appealed and its motion for direct certification was granted. In order to preserve the issue of the constitutionality of the 1962 Covenant, Gaby cross-appealed to the N.J. Supreme Court and his cross-motion for certification was granted.

Central to the issue of the validity of the Covenant is the question whether the mass transportation of people within the Port District was one of the principal activities authorized by the Company (N.J.S.A. 32:1-35.50 et seq.) and whether the insulation of the Port Authority from that activity was in such derogation of the Compact as to frustrate its meaning and intent and so material as to require Congressional approval.

The movement of persons within the Port District was a fundamental and integral part of the plan of port development authorized by the Congress to be undertaken when it approved the Company. Until the enactment of the 1962 Covenant, the Port Authority recognized that it had a responsibility in this area albeit one which had not been the subject of specific implementation.

A. Legislative history of Port Authority mass transit commitment prior to the Covenant.

Art. XXII of the Compact defined transportation facilities to

> ". . . include railroads, steam or electric, motor truck or other street or highway vehicles, tunnels, bridges, boats, ferries, carfloats, lighters, tugs, floating elevators, barges, scows or harbor craft of any kind, aircrafts suitable for harbor service, and every kind of transportation facility now in use or hereafter designed *for use for the transportation of carriage of persons or property.*" (N.J.S.A. 32:1-23) (emphasis supplied)

In 1922 a Comprehensive Plan setting forth a development program for implementation by the Port Authority was enacted in the States and approved by Congress (Stip. at Tr. 8 et seq.). An integral part of that plan was the existing and proposed railroad lines in the Port District (9-10). The railroads were, of course, to be utilized both for freight and passengers.

> "In 1927 the New Jersey Legislature, stating that it was acting 'under and pursuant to the provisions of the (Port Authority) company,' 'authorized and directed' the Port Authority 'to make such plans for the development of said district supplementary to or amendatory of the comprehensive plan heretofore adopted by the Legislatures of the two States . . . as will provide adequate interstate and suburban transportation facilities for passengers traveling to and from one State to the other within the said district, and from one part of the said district to another, sometimes referred to as commuter or suburban passenger traffic, to the end that travel between various parts of the port district may be made more convenient, practicable and economical for those residing in one region in the port district and doing business in another region thereof.'" (Stip. 75).

Governor Moore of New Jersey approved legislation directing the Port Authority to establish commuter fa-

cilities. A similar bill was vetoed in the State of New York by Governor Smith who was of the opinion that the initial objection of unifying freight facilities should first be accomplished (Stip. 76 to 78).

Governor Smith stated that:

> "I am satisfied that the Port Authority should stick to this program, and I am entirely unwilling to give my approval to any measure which at the expense of the solution of the great freight distribution problew will set the Port Authority off on an entirely new line of problem connected with the solution of the suburden passenger problem." (Stip. 77)

The Port Authority has pointed to Governor Smith's statement as the basis for its conclusion that it does not have responsibility for the transport of persons as distinguished from freight. The States had the right under the Compact to require the Port Authority to undertake projects within the scope of its authority. The veto of Governor Smith constituted nothing more than a judgment that the problems relating to freight should take priority (in 1928) over problems relating to the transportation of people. The veto was not based upon an absence of authority on the part of the States to require the Port Authority to provide for the transport of persons.

In 1928 Annual Report of the Port Authority included this comment:

> "The Commissioners of the Port Authority have found in their studies that no adequate or effective interstate transportation development can take place without taking full account of transportation of passengers as well as of freight throughout the Port District." (Stip. 78)

> "Annual reports issued by the Port Authority pursuant to the Compact after 1923 included material relative to the Port Authority's efforts relating to 'Suburban Transit.'" (Stip. 79)

In 1928 the North Jersey Transit Commission Report stated that:

> "decision (was) reached that the bi-state character of the Port of New York authority enabled it to function admirably as a co-ordinating agency between the various official bodies severally engaged in the study of the commuter problem in different parts of the Metropolitan District of New York and New Jersey." (Stip. 79)

> "On June 22, 1936, the Legislature of the State of New Jersey in Joint Resolution No. 6, Laws of New Jersey of 1936, noting that the Port Authority had been 'created' for the purpose, among other things, of 'coordinating and developing transportation facilities within the Port of New York District,' requested the Port Authority to report upon interstate and suburban passenger transportation." (Stip. 83)

Pursuant to the 1936 Joint Resolution, the Port Authority issued a report on suburban transit in 1937 (Stip. 84-85). In that report the Port Authority specifically recognized that suburban rapid transit and its coordination and development were ". . . functions (which) are within the scope of the Port of New York Authority. . . ." (Stip. 85)

The 1938 Legislature of New Jersey by Resolution No. 1 requested the Port Authority to continue its studies with respect to financing mass transit facilities (Stip. 86).

In 1949 the Coverdale report relating to mass transit in northern New Jersey was issued and made use of ". . . extensive plans and estimates which the Port Authority had previously compiled . . ." (Stip. 89)

In 1951 Commissioner Erdman (Department of Conservation and Economic Development) reported to Governor Driscoll with respect to mass transit that:

> "The Port of New York Authority studied the situation in 1920, in 1930 and again in 1937. It is the type of organization for this task. It should be made to recognize its responsibility because it is the human equation which makes the port important.
>
> "It has recently announced its intentions to spend some $80,000,000 for an additional vericular tunnel near the Holland Tunnel. This will increase street traffic, where there is now altogether too much of this type of transportation. The streets have reached the saturation point. Therefore, the need is not for more streets, but rather for the relief of those we have. It would seem far better if the Authority has $80,000,000 to spend on a tunnel that it should be a rapid transit tunnel and not a vehicular one." (Stip. 91)

In 1951 the Jenny report noted that:

> ". . . the 1920 Plan of the New York-New Jersey Port and Harbor Development Commission had stated, 'Our Port problem is primarily a railroad problem . . . therefore, the comprehensive plan to evolve which this Commission was created is essentially a railroad plan . . . A complete reorganization of the railroad terminal system is the most fundamental physical need of the Port of New York. . . . The most pressing element of the entire port problem is that of railroad service to and from Manhattan.' Mr. Jenny further noted that 'although 30 years have elapsed since, and our problem has grown very much worse, we still have done nothing to solve it.' Noting that the Port Authority's March 1, 1937 report had stressed the desirability of the development of rapid transit facilities for northern New Jersey, Mr. Jenny stated: 'This sound advice was given a decade and a half ago, yet no one has paid any attention to it, not even the Port Authority itself. . . .'" (Stip. 94)

In 1952 the New Jersey Regional Planning Commission recommended:

> ". . . the creation of a Metropolitan Rapid Transit Authority. The Regional Planning Commission further recommended that the Port Authority be requested to provide the funds needed for further study and such other assistance as might be requested by the Metropolitan Rapid Transit Authority." (Stip. 97)

In 1955 the Metropolitan Rapid Transit Commission negotiated with the Port Authority with which it reached a Memorandum of Understanding that the Port Authority would finance a compresensive study of the interstate rail problem in the Port District (Stip. 100-101).

In 1958 by Assembly Bill No. 16 a proposal was made that the Port Authority take over, develop and improve rail passenger facilities between New Jersey and New York. The Port Authority expressed its active opposition (Stip. 110 et seq.).

In 1959 the Metropolitan Rapid Transit District and Port Authority issued a joint report. That joint report first recognized that:

> "There can be no question that the carrying on of a transit function was well within the Port Authority Compact terms and well within the present powers." (Stip. 123)

It also stated the Port Authority's reasons for opposing legislation which would commit it to implementing plans for improving transit facilities (Stip. 123).

In 1959 New York and New Jersey enacted legislation facilitating the utilization of Port Authority funds (with State guarantees of payment) for the purchase of commuter railroad cars. The State of New York has made use of the program. The State of New Jersey has not (Stip. 129).

In 1960 the New Jersey Senate created the Farley Committee to conduct "a full and unlimited investigation of the Port Authority." (Stip. 141 et seq.) Dwight R. G. Palmer (New Jersey Highway Commissioner) testified before that Committee in 1961. With respect to commuter railroads, he said that:

> ". . . In other words, we became convinced that the Port Authority's responsibility in the rail transit field should be concerned principally with the interstate aspects of the problem as the Authority is an interstate or by-state agency. Our recommendations were consistent with that philosophy." (Stip. 145)

Port Authority Commissioner James C. Kellogg testified before the Farley Committee in part as follows:

> "At the outset, I would like to re-affirm our view that both rail and highway transportation are essential to the economic welfare of the people of the New Jersey-New York metropolitan region. It was for this reason that the Port Authority made $800,000 available to the Metropolitan Rapid Transit Commission to undertake a comprehensive interstate transit survey. We do not now, nor have we ever regarded arterial highway or our own bus terminal services for the accommodation of New Jersey commuters as substitutes for a program of maintaining and improving rail passenger facilities between New Jersey and Manhattan and throughout the Port District.
>
> • • •
>
> "For more than thirty years, the Port Authority has been engaged in studies of all aspects of terminal and transportation facilities and services within the New Jersey-New York metropolitan area. We have continuously searched for solutions to the commuter railroad problem in the form of physical plans which could adequately serve the commuting public and which, at the same time, could be developed on a self-supporting basis. . . ." (Stip. 154-155)

B. Enactment of the Covenant and subsequent actions.

In 1962 New York and New Jersey enacted legislation authorizing the Port Authority to construct the World Trade Center and to take over the Hudson and Manhattan Railroad (N.J.S.A. 32:1-35.51, et seq.). As a part of that legislation the Covenant with bondholders (N.J.S.A. 32:1-35.55) was also enacted.

The Covenant contained in N.J.S.A. 32:1-35.55 is in the following language:

> "The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, (a) the 2 States will not diminish or impair the power of the port authority (or any subsidiary corporation incorporated for any of the purposes of this act) to establish, levy and collect rentals, tolls, fares, fees or other charges in connection with any facility constituting a portion of the port development project or any other facility owned or operated by the port authority of which the revenues have been or shall be pledged in whole or in part as security for such bonds (directly or indirectly, or through the medium of the general reserve fund or otherwise), or to determine the quantity, quality, frequency or nature of the service provided in connection with each such facility; and (b) neither the States nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act shall apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted hereinafter set forth." (Stip. 204)

The Statutes continues with a definition of affected bonds:

> "'Affected bonds' as used in this section shall mean bonds of the port authority issued or incurred by it from time to time for any of the purposes of this act or bonds as security for which there may or shall be pledged, in whole or in part, the general contract between the port authority and the holders of such bonds, or the revenues of the world trade center, Hudson tubes, Hudson tubes extensions or any other facility owned or operated by the port authority any surplus revenues of which would be payable into the general reserve fund, or bonds both so issued or incurred and so secured."

The practical effect of the Covenant was to make Port Authority funds unavailable for mass transport use (except PATH) to at least the year 2007.

The Port Authority purchased and proceeded to operate PATH after certification in accordance with the preexisting consolidated bond resolution that the prospective losses would not impair the sound credit rating of the Authority (Stip. 209).

In 1970 Governors Chaill and Rockefeller enacted proposed legislation to increase the role of the Port Authority in mass transit, more particularly by extending PATH to Newark Airport and building a rail link to Kennedy Airport. Governor Cahill said that: "one purpose of the legislation that will be introduced in both state bodies will be to erase the authority's impression that as long as the PATH system is operating at a loss the authority is absolved from any further responsibility for mass transit." (Stip. 222)

> "In June 1971, the Legislatures of New York and New Jersey enacted legislation authorizing the Port Authority to extend passenger rail transportation to Kennedy International Airport and to Newark

International Airport and Cranford (Chapter 245, Laws of New Jersey of 1971). While this legislation was pending, the Port Authority obtained opinion letters from the New York firms of Hawkins, Delafield & Wood (May 3, 1971) and Davis Polk & Wardwell (June 3, 1971), which concluded that the proposed rail extensions were subject to the provisions of the 1962 Covenant and could not be financed out of Port Authority revenues or reserves unless 'self-supporting' . . ." (Stip. 233)

The Hawkins Delafield letter addressed itself to the statutory device of defining the Kennedy-Newark rail links as airport improvements:

"The terms 'railroad' or 'railroad purposes' are not defined in the 1962 legislation. However, the term 'railroads' is given a broad definition in the 1921 Compact creating the Authority and reference must be made to that definition for the purposes of giving meaning to the term in the 1962 legislation. The term 'railroad' as so defined provides no exceptions for a railroad facility which might be incidental or necessary to some other project or program of the Authority. It seems clear to us that the facility described above falls within the definition of 'railroads' in the 1921 Compact and therefore constitutes a railroad within the meaning of the 1962 legislation. We may add that, in our opinion, any attempt to limit the definition of 'railroad' or 'railroad purposes' prohibited or restricted by the 1962 legislation by including railroad facilities within other definitions as suggested in the bills to amend Ch. 802, Laws of N.Y., 1947 (A6833 and S9480) introduced in the New York Legislature in April,

1970 would be ineffective for the purposes of the statutory covenant contained in the 1962 legislation." (Stip. 236)

The Davis Polk opinion stated that, ". . . the mere redefinition of 'air terminals' by the bill would be ineffective to remove the facilities of the Project from the ambit of the Covenant." (Stip. 238)

Thus, having in 1962 purported to insulate the Port Authority from further mass transit obligations, the Legislatures of New York and New Jersey were effectively frustrated in their 1971 attempt to get the Port Authority back into mass transit by redefining railroad lines as airport improvements.

In December of 1971 the First Boston Corporation, which had been commissioned by the Port Authority to do a Passenger Rail Transportation Study, reported that, ". . . the 1962 Covenant 'precludes general credit financing of any passenger transportation project, no matter how desirable, for which projects show an operating profit below debt service requirements.'" (Stip. 243)

In November 1972 Governors Cahill and Rockefeller and the Commissioners of the Port Authority announced agreement on a plan for rail mass transportation improvement. The plan included the extension of PATH to Newark and beyond to Plainfield, as well as the creation of rail service to Kennedy (Stip. 253).

In an attempt to effectuate that plan, the 1962 Covenant was amended in New York and in New Jersey. (Chs. 207 and 208, Laws of New Jersey of 1972, Ch. 1003, Laws of New York of 1972, Chs. 317 and 318, Laws of New York of 1973) (N.J.S.A. 32:1-35.55[a]). That amendment repealed the Covenant but prospectively only. In the light

of the fact that bonds already issued would not mature until 2007, the partial repealer was ineffective in terms of freeing Port Authority funds from the strictures of the 1962 Covenant until 2007.

The 1972 Annual Report of the Port Authority announced the plan of the two Governors for the expension of the Port Authority's role in mass transit (Stip. 263 et seq.).

Finally, in that circumstance in which the Port Authority and the States of New York and New Jersey had agreed upon certain mass transit projects, but nevertheless been frustrated by the 1962 Covenant, both States enacted a repealer (in New Jersey Ch. 25 of the Laws of 1974).

> "This bill is designed to preclude the application of the 1962 covenant restricting port authority participation in mass transit projects. Chapter 208, P.L. 1972, precluded such application to bonds newly issued after the effective date of that act, but maintained in status quo the position of holders of bonds issued between March 27, 1962 and December 28, 1972. Since affected bonds are outstanding until the year 2007, the restrictions imposed by the covenant effectively preclude sufficient port authority participation in the development of a public transportation system in the port district. In 1972 the State of New York passed legislation precluding the application of the 1962 covenant from outstanding bonds as well as newly issued bonds. It is the purpose of this act to accomplish effective repeal of the covenant." (Stip. 356)

Governor Wilson said in part that:

> "Coupled with action taken by the State of New Jersey, this bill retroactively repeals the 1962 statutory covenant entered into between the States of New York and New Jersey and prospective purchasers of bonds of the Port Authority of New York and New Jersey. Pursuant to that covenant, the Port Authority is prohibited from using its revenues beyond the existing Port Authority Trans-Hudson (PATH) System for rail mass transit facilities unless such facilities would be self-supporting." (Stip. 356)

Governor Byre said that:

> "The bill, A-1304, sponsored by Assemblyman Herbert C. Klein, D-Passaic, repeals the 1962 covenant which has effectively precluded the port authority from becoming involved in mass transit projects in the New York metropolitan area. The covenant restricts the authority from participation in mass transit projects which are not self-sustaining.
>
> "'I hope this bill, coupled with the same legislation in New York State, will clear the way once and for all for the port authority to fulfill which I believe was one of its original functions,' said Byrne. 'The authority was created as a transportation agency and I intend to see that it lives up to its original promise of assisting in establishment of a quality public transportation system for the metropolitan region without in any way impairing its fiscal integrity.'" (Stip. 358)

The record in the proceedings below was supplemented to reflect the fact that on the day following the issuance

of the Court's Opinion (May 14, 1975), the Port Authority announced substantial increases in bridge and tunnel toll charges. The Authority further announced that the purpose of such increases was to provide funds for mass transit. The 1962 Covenant having been repealed, the Authority, with appropriate financial safeguards, was now free to respond to the legislative direction of the States in the field of mass transit; to implement a major element of the Compact.

The Federal Question Presented is Substantial

This appeal presents a substantial question involving whether or not the Compact clause of the *Constitution* has been violated by the enactment of the 1962 Covenant. At the outset, it should be noted that this appeal is integrally related to the appeal to this Court in the cause with which it has been consolidated, *United States Trust Company of New York, et al.* v. *The State of New Jersey, et al.* That case relates to an attack upon the statute repealing the contested covenant. The repealer was upheld by the Supreme Court of New Jersey. In the event that decision is reversed by this Court, the validity of the 1962 Covenant will be at issue. This appeal is taken, therefore, to preserve the issue of the Covenant's validity in the event that the repealer is determined to be invalid.

The interpretation and construction of an interstate compact sanctioned by Congress is a matter of federal law. *Delaware River Joint Toll Bridge Comm'n* v. *Colburn,* 310 U.S. 419 (1940); *Petty* v. *Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275 (1959); *Parden* v. *Terminal Railway of Ala., State Docks Dept.,* 377 U.S. 184 (1964). The 1962 Covenant constitutes a radical alteration in the

substance of the initial agreement between the states, and, as such, must be approved by Congress. The consent of Congress is a prerequisite to the validity of such agreements. *Howell* v. *Port of New York Authority,* 34 F. Supp. 797 (D.C. N.J. 1940). The covenant, in practical effect, materially altered the purposes of the original agreement.

The Covenant was a fundamental impairment of the Compact in that it effectively made it impossible for the States legislatively to authorize the Authority to plan, coordinate or implement plans for mass transit. Thus it was necessarily in derogation and not in furtherance of the purposes of the Compact.

The bi-state structure and jurisdiction of the Port Authority—an agency set up by Compact between two states, with interstate planning, operational and economic responsibilities and powers—underscores the original reason for and need of Congressional consent.

Since the adoption of the original Compact and the Comprehensive Plan in 1921 and 1922, respectively, the states of New York and New Jersey have enacted numerous bills "supplementary to" and "amendatory of" the original legislation. This legislation granted the Port Authority additional powers, such as the power to condemn, to construct certain bridges, tunnels, and terminals, to operate rairports, to pool its finances, etc., but all such additional responsibilities and powers were consistent with the purposes of the Compact and specifically in aid of the Port Authority's duty to plan and develop a coordinated system of transportation and terminal facilities.

The covenants must fall for they constitute agreement between the states not approved by Congress as required by the Constitution of the United States.

Article I, Section 10, of the United States Constitution, provides:

> "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign power . . ." (clause 3, the Compact clause).

We are concerned here with an express agreement between the states not in furtherance of the original purposes of the Compact but in contravention of the Port Authority's mandate to plan and develop a coordinated system of transportation. Its major obligation to plan was not severable from any particular duty, but was the glue which bound them together. While the Port Authority increasingly ignored this statutory duty, it was capable until 1962 of financing and therefore formulating and effectuating plans for the coordination and development of all forms of transportation. This necessarily included mass transportation. The 1962 covenants, as noted, effectively barred use of Port Authority funds for mass transportation beyond the Hudson Tubes.

Without the capacity to use its funds for mass transportation, the Port Authority became incapable of formulating and effectuating plans for the *coordinated* system of all forms of transportation in the Port District contemplated by the Compact. In this way the covenants materially altered the Compact. They were not in "furtherance" of the Compact's purposes but in defiance of them. Moreover, to the extent that the Port Authority is relieved of its responsibilities and obligations to mass transportation, it is able to increase the time and money it can devote to transportation facilities that produce revenues. In this way, its powers are increased. This has led to the Port Authority's excessive support of facilities for automobiles creating imbalances in all forms of transportation—the very opposite effect envisioned by the Compact.

The Attorney General of New Jersey (F.O. 1957 No. 13) had this to say concerning non-congressional impairment of Compacts:

> "As Justice Jones stated in *Henderson* v. *Delaware River Joint Toll Bridge Commission*, 362 Pa. 475, 66 A.2d 843 (Sup. Ct. 1949):
>
> 'It is within the competency of a State, which is a party to a compact with another State, to legislate in respect of matters covered by the compact so long as such legislative action is in approbation and not in reprobation of the compact.' (at pp. 849, 850).
>
> A State statute which is in conflict with an interstate compact approved by the Congress is an invalid impairment of contract in violation of the contract clause of the United States Constitution, Article I, Section X, par. 1; *Green* v. *Biddle*, 23 U.S. 1 (1823); Cf. *Olin* v. *Kitzmiller*, 259 U.S. 260 (1922); *P.J. McGowan & Sons, Inc.* v. *Van Winkle*, 21 F. 2d 76 (D.C. Oreg. 1972), affirmed 277 U. S. 574 (1928). Accordingly, the general contracting power vested in the Division of Purchase and Property cannot constitutionally apply to the Commission."

In the final analysis, the question comes down to this: must a bi-state agreement relating to an agency with billions of assets, substantial regulatory powers and tremendous impact on interstate commerce, be approved by Congress pursuant to the Compact clause where the ef-

fect of the agreement is to exacerbate an already deteriorating transportation situation, contrary to the purposes the Compact was intended to achieve. We submit that the answer is yes.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

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Dated: May 1976

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APPENDIX A

Decision of the Supreme Court of New Jersey

UNITED STATES TRUST COMPANY OF NEW YORK, AS TRUSTEE FOR THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY CONSOLIDATED BONDS, FORTIETH AND FORTY-FIRST SERIES; ON ITS OWN BEHALF AND ON BEHALF OF ALL HOLDERS OF CONSOLIDATED BONDS OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLANT-CROSS-RESPONDENT, v. THE STATE OF NEW JERSEY; BRENDAN T. BYRNE, GOVERNOR OF THE STATE OF NEW JERSEY; AND WILLIAM F. HYLAND, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

DANIEL M. GABY, PLAINTIFF-CROSS-APPELLANT, v. THE PORT OF NEW YORK AUTHORITY, JAMES C. KELLOGG, III, HOYT AMMIDON, GUSTAVE L. LEVY, JAMES G. HELLMUTH, ANDREW C. AXTELL, WILLIAM J. RONAN, W. PAUL STILLMAN, WALTER H. JONES, BERNARD J. LASKER, PHILIP B. HOFFMAN, AND JERRY FINKELSTEIN, COMMISSIONERS OF THE PORT OF NEW YORK AUTHORITY, AUSTIN J. TOBIN, EXECUTIVE DIRECTOR OF THE PORT OF NEW YORK AUTHORITY, AND WILLIAM T. CAHILL, GOVERNOR OF THE STATE OF NEW JERSEY, DEFENDANTS-CROSS-RESPONDENTS, AND UNITED STATES TRUST COMPANY OF NEW YORK, ETC., INTERVENOR.

Argued October 7, 1975—Decided February 25, 1976.

SYNOPSIS

Class action on behalf of citizens, residents and taxpayers whose occupations were dependent upon the existence of mass transportation was brought against Port Authority of New York and New Jersey challenging constitutionality of covenant between the States of New Jersey and New York on one hand and the holders of bonds issued by the Port Authority on the other hand with respect to the use to which certain revenues were to be put. After the covenant was repealed by New Jersey Legislature, trustee for the bonds brought action challenging the constitutionality of the repealing statute. The Superior Court, Law Division, 134 *N. J. Super.* 124, upheld the constitutionality of the repealer and dismissed the class action and the parties appealed. The Supreme Court held that compact which created the Port Authority empowered, but did not mandate, the Authority to develop a plan for a particular kind of method of transportation; and that, since the Authority had exercised its discretion by rejecting a policy favoring mass transportation, mandamus did not lie to compel the Authority to develop a plan for mass transit even though, by virtue of repeal of the covenant, it had the funds to do so.

Affirmed.

Pashman, J., concurred in part and dissented in part and filed an opinion.

Mr. Robert B. Meyner and *Mr. Devereux Milburn*, of the New York bar, argued the cause for appellant-cross-respondent-intervenor United States Trust Company (*Messrs. Meyner, Landis and Verdon*, and *Messrs. Carter, Ledyard and Milburn* and *Hawkins, Delafield and Wood*, of the New York bar, attorneys; *Mr. Meyner, Mr. Milburn*, and *Mr. Donald J. Robinson*, of the New York bar, on the brief and of counsel).

Mr. Murray J. Laulicht and *Mr. Michael I. Sovern*, of the New York bar, Special Counsel to the Attorney General, argued the cause for respondents-cross-appellants State of New Jersey, Brendan T. Byrne and William F. Hyland (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Laulicht, Mr. Sovern* and *Mr. Harold Edgar*, of the New York bar, Special Counsel to the Attorney General, on the brief).

Mr. Howard Stern argued the cause for plaintiff-cross-appellant Daniel M. Gaby (*Messrs. Shavick, Stern, Schotz, Steiger and Croland*, attorneys; *Mr. Stern* on the brief. *Mr. Stern* and *Mr. Theodore W. Kheel* of the New York bar and *Messrs. Battle, Fowler, Stokes and Kheel* of the New York bar, of counsel).

Mr. Francis A. Mulhern argued the cause for cross-respondent The Port Authority of New York and New Jersey, et al. (*Mr. Mulhern,* attorney and on the brief; *Mr. Patrick J. Falvey* of the New York bar, *Mr. Joseph Lesser* of the New York bar, *Ms. Isobel E. Muirhead, Mr. Arthur P. Berg* of the New York bar, and *Mr. Vigdor D. Bernstein,* of counsel).

PER CURIAM. The judgment is affirmed, substantially for the reasons set forth in the opinion of Judge Gelman, 134 *N. J. Super.* 124 (Law Div. 1975). The observations which follow are occasioned by Justice Pashman's suggested remedy in the Gaby suit.[1]

Whatever persuasive force might be accorded the argument that as a matter of policy the Port Authority should devote more of its energies and resources to the mass transit field, the fact remains that the remedy fashioned by our Brother is neither pressed for by Gaby on this appeal nor within the powers of this Court to direct and enforce.

Gaby's class action complaint for a declaratory judgment that the 1962 Covenant was unconstitutional asked for "multifarious relief," including a request that the Port Authority be directed "to formulate and submit to the court a plan for the development of mass transit facilities within the Port District," 134 *N. J. Super.* at 131. However, the trial judge, having concluded in the *United States Trust Co.* suit that "the repeal legislation was a reasonable and hence valid exercise of the states' police power which is not prohibited by the Contract Clause of either the Federal or the State Constitution," *id.* at 197, found it unnecessary to reach the issue of the 1962 Covenant's asserted invalidity. He therefore dismissed Gaby's complaint, *id.* at 198, without discussing the requested relief of a direction for development of a mass transit plan, on which issue there was neither testimony nor argument at the trial level.

[1] Justice Pashman would order the Port Authority to complete pending projects and to "formulate and present plans and suggestions for a regional mass transportation scheme to the Legislatures of New York and New Jersey * * * in an expeditious fashion and within a fixed period of time." *Post* at 288.

In his brief filed in the Court after direct certification of his appeal, 68 *N. J.* 175 (1975), Gaby conceded his limited purpose in pursuing the appeal as being "to preserve the issue of the constitutionality of the 1962 Covenant." The point of this in turn was, as he put it, to furnish "an alternative ground for affirming the decision below."[2] Whatever issues may have been preserved by his appeal and whatever desire there may have been to present "all the issues," the fact remains that Gaby's brief raises and discusses only the validity of the Covenant in constitutional terms. No argument is made there for any special relief; and, understandably, the Port Authority has likewise not briefed the question at all in this Court. At oral argument the subject was adverted to only in a limited fashion.

Ordinarily, we would have no occasion to decide an issue which, while portentous in itself, has become so remote and peripheral to the central thrust of this litigation. However, inasmuch as the minority opinion raises and discusses *in extenso* this question of considerable public significance, namely, the involvement of the Port Authority in mass transit and particularly the propriety of this Court ordering as a specific remedy the submission of a plan for development of mass transit facilities, we overlook whatever infirmities may exist in the record before us, compounded by the practical disadvantage of not having the views of the parties, and proceed to address the point.

[1] The 1921 Compact between the States of New York and New Jersey, whereby the Port Authority was created, *N. J. S. A.* 32:1–4, envisioned the adoption of a Comprehensive Plan for the development of the port. *N. J. S. A.*

[2] Cross Motion for Certification of Plaintiff-Respondent, Daniel M. Gaby.

32:1–11. Direction was given to the Port Authority in the Plan itself "to proceed with the development of the port of New York in accordance with said comprehensive plan * * *." *N. J. S. A.* 32:1–33. That the Authority's involvement in transportation matters was contemplated is obvious from a reading of this and other portions of the Comprehensive Plan as well as of the Compact; but it requires a quantum leap to derive therefrom a mandate (as distinguished from the power) to develop a plan for a particular kind or method of transportation, to wit, mass transit. It is not without significance, for instance, that the legislature has provided that the Authority *may* make recommendations for the increase and improvement of transportation facilities, *N. J. S. A.* 32:1–13, which by definition includes railroads and any facility for the "transportation or carriage of persons or property," *N. J. S. A.* 32:1–23; but nowhere is it mandated that such recommendations be made. A mandate such as that contemplated by the minority opinion is not something to be inferred by the courts but rather is a singularly appropriate subject for specific legislative directive, conspicuously absent here. *Cf. Del. Riv. & Bay Auth. v. N. J. Pub. Emp. Rel. Comm'n.*, 112 *N. J. Super.* 160, 165 (App. Div. 1970), aff'd o. b., 58 *N. J.* 388 (1971).

If, then, the Authority is in the position of being empowered (as we acknowledge) rather than mandated to act in the area of mass transit, its exercise of that power becomes a matter of discretion and judgment. As is made abundantly clear by the voluminous record in this case, the trial court's opinion, and the concurring and partially dissenting opinion here, the Authority has more than once in recent years broached the question of whether it should pursue a policy of encouraging mass transit and has determined that it shall not. The remedy suggested in the minority opinion is designed to overrule that decision. As such it is in the nature of the former prerogative writ of *mandamus*, now invocable under proceedings for relief in lieu of prerogative writs, *Rule* 4:69.

[2, 3] However, ***mandamus*** will not lie if the duty to act is a discretionary one and the discretion has been exercised. As Justice Heher explained, in *Switz v. Middletown Twp.*, 23 *N. J.* 580 (1957), *mandamus* is "a coercive process that commands the performance of a specific ministerial act or duty, or compels the exercise of a discretionary function, but does not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result." 23 *N. J.* at 587. As we have sought to demonstrate, the circumstances before us do not at all invite or accommodate the remedy proposed. This is so because the Authority (whose function is clearly not ministerial) has in fact exercised its discretion, even though that exercise has resulted in the rejection of a policy favoring mass transportation. Being a judgment decision its wisdom may be open to dispute; but as to the propriety of this Court's refusal to intrude on the underlying policy determination, there can be no question in the circumstances before us. And this not as a response to some procedural deficiency but because of our respect for the fundamental substantive principle embodied in *mandamus*.

Finally, we observe that in this particular area of bi-state operations, there is close and continuing supervision of the Port Authority by the other branches of government. Hence, the proposed remedy would not only tend to usurp the influence over the Authority vested in the Governors of the States of New York and New Jersey, but would also intrude upon the functions of the legislatures of the respective States, whose task it is in the final analysis to enact appropriate legislation and take such other action as may be required to remedy whatever deficiencies may exist with respect to mass transit.

Affirmed.

PASHMAN, J. (concurring in part and dissenting in part).

I

INTRODUCTION TO GABY COMPLAINT

My Brothers today affirm a lower court decision which was the product of two separate and distinct actions consolidated for trial. *United States Trust Co. v. State*, 134 *N. J. Super.* 124 (Law Div. 1975). In the first action, brought by plaintiff United States Trust Company, the trial court sustained the State's repeal of the 1962 statutory covenant (*N. J. S. A.* 32:1–35.55) between the States of New Jersey and New York and the holders of bonds issued by the Port Authority of New York and New Jersey (Port Authority). That covenant was concurrently enacted by the legislatures of New York and New Jersey at the time of the Port Authority's acquisition of the Hudson & Manhattan Railroad Company (H & M), since renamed the Port Authority Trans-Hudson System (PATH). Intended as a means of protecting the bondholders' investments, the covenant prohibited the states and the Port Authority from applying "any of the rentals, tolls, fares, fees, charges, revenues or reserves, . . . for any railroad purposes whatsoever other than permitted purposes." *N. J. S. A.* 32:1–35.55. As subsequently defined in the covenant, "permitted purposes" precluded the establishment, acquisition or construction of any railroad facility until the Port Authority could determine that the facility would be self-supporting or would not produce deficits except within narrowly defined limits.

In dismissing plaintiff's cause of action, the trial court found that the 1974 "repealer," *N. J. S. A.* 32:1–35.55a, was immune from constitutional challenge as an impairment of contractual obligation, a right which is protected by *U. S. Const.*, Art. I, § X and *N. J. Const.* (1947), Art. IV, § VII, ¶ 3. As a collateral finding, the court determined that the attractiveness of Port Authority bonds was not contingent upon the continued protection of the 1962 covenant, but rather upon the viability of the Port Authority itself.

The majority affirms the trial court on these bases and to this extent, I concur fully and completely with the conclusions reached by Judge Gelman in his very enlightened and comprehensive opinion. My agreement is premised on the unduly restrictive influence which the covenant exerted on Port Authority operations in contravention of the statutory mandates upon which that agency was created in 1921. The paralytic effect of the covenant could be seen in the Authority's practical inability and attitudinal reluctance to respond to the mounting needs for rapid transit in the New York metropolitan area. In light of the limited utility which it continued to serve, the 1962 covenant represented an artificial obstacle to the affirmative public action which was necessitated as an alternative to continued and wasteful reliance solely on the private automobile as the primary mode of transportation.

The second action, *Gaby v. Port of New York Authority, et al.*, was likewise concerned with the repeal of the 1962 covenant. Expanded into a class action on behalf of citizens, residents and taxpayers whose occupations are dependent upon the existence of mass transportation, plaintiff cites the 1962 covenant as an impediment to the improvement and expansion of these facilities. While the State of New Jersey sought the repeal of the covenant as an ultimate end in the *United States Trust Co.* action, plaintiff Gaby visualizes a repeal as merely a means to a larger end. This is because the vindication of Gaby's interests is only partially dependent on freeing the financial resources from the restrictions of the 1962 covenant and placing them at the Port Authority's disposal. More problematical and essential to the relief which he desires is the necessity to overcome the administrative inertia which has characterized the agency's efforts in the area of mass transportation. Consequently, Gaby requested in his complaint that the trial court:

> . . . [D]irect and order the Port Authority, its Commissioners, and its Executive Director to formulate and submit to this Court, or a Special Master to be appointed by this Court, a plan for the

development of mass transportation facilities in the Port District. . . . [Plaintiff Gaby's complaint at 17]

This action was pretried on February 22, 1973 and oral arguments were heard on September 26, 1973 on the parties' respective motions for summary judgment. Judgment was deferred and arguments were later rescheduled to permit the submission of briefs on additional issues and the intervention of United States Trust Company as a party defendant representing the interests of Port Authority bondholders. Prior to these arguments, the pendency of legislation repealing the covenant recommended that the trial court withhold further review. Accordingly, the proceedings were stayed to permit consideration of the anticipated legislation.

The statutory repealer which was signed into law by Governor Brendan T. Byrne on April 30, 1974 precipitated the *United States Trust Co.* action, which was instituted on the same day. On the basis of common subject matter, this later action was consolidated on December 10, 1974 with the previously filed *Gaby* case by order of the trial court. These matters then proceeded to trial in February 1975.

The trial was largely confined to the factual issues of bondholder reliance on the 1962 covenant and resultant damage to the secondary bond market caused by the repeal of the covenant. The information which was thus elicited formed the basis for the trial court's reported opinion, 134 *N. J. Super.* 124, in which the constitutionality of the 1974 repealer was sustained. Although reasons upon which the court's decision was grounded were clearly distinguishable from the constitutional arguments advanced by Gaby, the court's ultimate decision — the rejection of the 1962 covenant — coincided with Gaby's interests. Regardless of whether that result was achieved by sustaining the 1974 repealer as the trial court did, or whether it was achieved by finding the 1962 covenant itself unconstitutional as suggested by Gaby, the result indicated the possibility of granting the further relief sought by Gaby. A more activist role

for the Port Authority appeared to be a reality. Nonetheless, the court concurrently ordered the dismissal of Gaby's complaint, thus frustrating the additional relief which he sought. 134 *N. J. Super.* at 198. From this disposition, Gaby filed a cross-motion for direct certification which was granted on May 28, 1975. 68 *N. J.* 175 (1975).

Similar to his presentation before the trial court, Gaby's arguments are again directed towards a declaration of the unconstitutionality of the 1962 covenant. This is more the result of strategic considerations, however, than devotion to substantive principle. Recognizing the limited nature of the trial court's factual findings and disposition, Gaby has taken what appears to be a most advisable legal course. By preserving the issue of the constitutionality of the 1962 covenant on appeal, he has simultaneously preserved one of his major contentions should this or any other court reverse the trial court on the constitutionality of the 1974 repealer.

Furthermore, in his Supreme Court brief, Gaby explained that his contentions with regard to the 1962 Covenant are inextricably tied to his request for greater involvement of the Port Authority in mass transit projects:

> The Appellant's Brief of Gaby is concerned with the validity of the 1962 Covenant (*N. J. S. A.* 32:1–35.50 *et seq.*). Central to the issue of the validity of the Covenant is the question whether the mass transportation of people within the Port District was one of the principal activities authorized by the Compact (*N. J. S. A.* 32:1–35.50 et seq.); whether the insulation of the Port Authority from that activity was in such derogation of the Compact as to frustrate its meaning and intent and so material as to require Congressional approval. [Plaintiff-Cross Appellant's brief at 3].

The majority today chooses to overlook this relationship in its reluctance to transcend the judgmental confines of the trial court and in its affirmation of that court's dismissal of Gaby's complaint. This disposition, undertaken in an unusually cavalier fashion, is not a product of some misunderstanding as to the essential relief which Gaby requests. On the contrary, the majority recognizes the strategic con-

siderations implicit in Gaby's desire to preserve the issue of the constitutionality of the 1962 Covenant. *Ante* (at 261). Nonetheless, in characterizing the constitutional arguments raised by Gaby as exemplifying a "limited purpose in pursuing the appeal," the majority misconstrues and frustrates the true interests of Gaby, and has done so in a manner which I find most distressing.

The majority justifies its truncated consideration of Gaby's plea by referring to an isolated phrase, taken out of context from a sentence which Gaby adopted as representative of his position in his cross-motion for certification. When more appropriately considered within the sentence in which it originally appeared, the phrase — "an alternative ground for affirming the decision below" — assumes an entirely different meaning from that which the majority attaches to it:

> The purposes of this cross motion are identical with those stated by the State of New Jersey in its cross motion for certification: ". . . bring before the Supreme Court *all of the issues submitted to Judge Gelman* and to avoid the possibility that some of the issues submitted to Judge Gelman might have to be determined in the first instance by the Appellate Division. Because of the urgency and public importance of this case, it would be most unwise to require a piecemeal, appellate process, particularly since the [first] issue presented by this cross motion could be an alternative ground for affirming the decision below. . . ." [Plaintiff-cross appellant's appendix at 47a–48a; emphasis supplied].

While the "first issue" refers to the constitutionality of the 1962 covenant, I believe it would be wrong to confuse Gaby's real interest in stimulating improvement of urban mass transportation with his more temporal interest in having the 1962 covenant declared unconstitutional. The majority not only fails to make this distinction, but fails to do so despite Gaby's expressed desire to present "all of the issues" to this Court.

This failure is only compounded by the majority's persistent willingness to ignore the Gaby complaint and the relief which it warrants. In spite of plaintiff's overindulgent concern for the constitutionality issue, the statement of his case reflects

more than a limited and perfunctory reference to the subject. During the course of oral argument, counsel for Gaby specifically stated:

> Yes, as we read the compact between the states, the affirmative obligation of the Port Authority in this area is to plan. The immediate affirmative obligation . . . and indeed in these briefs and elsewhere, there is a suggestion that if the Covenant is invalid or the repealer upheld, either way, that it would be appropriate for the Court to direct the Port Authority to study mass transit needs in the Port Authority area and make proper proposals. Then when it comes to implementation, then you're talking about legislation of the two states, but the affirmative obligation of the Port Authority is to study the problem as it affects the Port area.

It should be noted in passing, that this statement not only affirms the relief desired by plaintiff, but also embodies a request for a remedy which parallels that which I suggest below, *infra* at 287–288.

Therefore, although my Brothers remove the constricting fiscal shackles of the 1962 covenant, they fail to take the additional steps which flow as natural concomitants to the action which they affirm. This failure, as I see it, stems, in part, from a reluctance to go farther and faster in an area plagued by administrative inaction and intransigence. It also constitutes an indulgence in the meaningless gesture of sustaining the 1974 repealer without concurrently authorizing the relief needed to implement the initiative which the Legislature sought to instill in the Port Authority by that repeal.

As I fear, the administrative foot-dragging which was implicit in the 1962 covenant, may be only symptomatic of the inertia which has characterized the Port Authority in the field of mass transit operations. The majority's decision can only serve to perpetuate this sad state of affairs.

In light of the rapidly deteriorating condition of mass transit operations in the metropolitan area, this disposition is most unfortunate. Faced with the ever-increasing deficits which are inherent in this mode of public transportation, mass transit operations have been repeatedly shunned by the Port

Authority in spite of its statutory mandate to the contrary. As cutbacks in service have been experienced throughout the Port District, the commuters' resort to the private automobile has produced a dysfunctional volume of traffic congestion and pollution. The toll which this congestion has exacted has been obvious in the tunnels and on the bridges, whose operations the Port Authority apparently prefers to maintain.

Unlike today's majority, I am unwilling to assign plaintiff Gaby's case to death or to a peaceful somnambulism. This is particularly so where within the historical and evidential materials presented to the trial court reside the seeds for a more sweeping and effective disposition. I cannot sanction the mere repeal of the 1962 covenant without a concurrent assurance that the Port Authority will assume those responsibilities for which it was created and, which to this point, it has effectively avoided. The recalcitrance of the Port Authority has not been altered by the trial court's disposition and will not be altered by merely affirming that decision. A more effective disposition is needed.

II

HISTORY OF THE OBLIGATION OF THE PORT AUTHORITY TO PROVIDE MASS TRANSIT FACILITIES

In its opinion, the majority grudgingly acknowledges the Port Authority's obligation to become involved in mass transportation. After a perfunctory reading of the statutory framework of the Port Authority, the majority concludes that the existence of such a mandate is "a singularly appropriate subject for specific legislative directive, conspicuously absent here." (At 258).

While specific statutory directives have served as vehicles for recent Port Authority projects, *N. J. S. A.* 32:1–35.20 (authorization for the Port Authority to undertake mass transportation projects to link the various airports in the Port District), *N. J. S. A.* 32:1–35.21 (authorization to

build railroad lines to and facilities at the various airports in the Port District), its employment is in its infancy and affords no insight as to the previously reluctant forays which the Port Authority has made into the field of mass transportation. A full consideration of the statutory basis of the Port Authority and the history of its implementation reveals that the majority's interpretation of the Authority's powers and obligations is both short-sighted and erroneous. For instance, the statutory creation of the Port Authority evinces a clear legislative intent to have the Authority become involved in development of mass transportation. The majority position misconceives the role of the Authority to be a drone-like entity ultimately dependent upon enabling legislation, rather than a separate bi-state agency. Similarly, the majority fails to recognize the inherent limitations on the knowledge, information and expertise which are at the disposal of the New Jersey and New York Legislatures on the subject of mass transit operations. In light of this fact, the wisdom of relying upon legislative directives to address the panoply of needs within the field of mass transportation becomes problematical. The failure of the majority to account for these factors casts a large shadow upon the validity of its construction of the Port Authority's powers. These inadequacies within the majority position become apparent upon thorough consideration of the statutory origins of the Port Authority and the mandate which was encompassed in its original Compact and Comprehensive Plan.

A. Origins and Early Development; Compact and Comprehensive Plan

The Port Authority is a statutory product of a compact which was entered into by the States of New Jersey and New York in 1921.[1] Modeled after the recommendations of a joint

[1]New Jersey approved the compact by *L.* 1921, *c.* 151, now contained in *N. J. S. A.* 32:1-1 *et seq.* The comparable New York

commission,[2] the Port Authority represented a response to the dysfunctional competition and commercial disputes which historically had plagued the two states.[3] As such, it was intended to meet the needs and interests which the two states shared with respect to the Port of New York. This was expressly recognized in the preamble to the 1921 Compact, which stated:

> The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums

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legislation was adopted in *Laws of New York* 1921, *c.* 154, now contained in *N. Y. Unconsol. Laws*, § 6401 *et seq.* (McKinney 1961). Congressional consent to the compact was granted by *Pub. Res. No.* 17, *S. J. Res.* 88, *c.* 77, 42 Stat. 174.

At the time of creation, the agency was designated "The Port of New York Authority." *N. J. S. A.* 32:1–4. This was amended by *L.* 1972, *c.* 69, §§ 1, 2, contained in *N. J. S. A.* 32:1–4 and 32:1–4.1, to the more ecumenical "The Port Authority of New York and New Jersey." For the purposes of this opinion, the agency shall be referred to as the Port Authority or just Authority.

[2]The New York, New Jersey Port and Harbor Development Commission was a body whose representative membership were created by independent, though concurrently enacted bills which were passed by the Legislatures of New Jersey and New York in 1917. Composed of three commissioners from each state, the commission issued a preliminary report in 1918, New York, New Jersey Port and Harbor Development Comm'n, *Preliminary Joint Report, Transmitted to the Legislature*, February 18, 1918 (1918). This was followed by a progress report in 1919, and a comprehensive report in 1920, in which the commission proposed the establishment of a permanent body with interstate jurisdiction. *Joint Report with Comprehensive Plan and Recommendations* (1920). It subsequently submitted the tentative draft of the proposed compact. See *Bard, The Port of New York Authority*, 24–34 (1942).

[3]The enmity between the two states traces its roots as far back as the seminal case, *Gibbons v. Ogden*, 22 *U. S.* (9 Wheat.) 1, 6 *L. Ed.* 23 (1824). Although it has from time to time received exhaustive consideration in the case law, *New Jersey v. New York*, 28 *U. S.* (3 Pet.) 461, 7 *L. Ed.* 741 (1830); 30 *U. S.* (5 Pet.) 284, 8 *L. Ed.* 127 (1831); 31 *U. S.* (6 Pet.) 323, 8 *L. Ed.* 414 (1832); *In the Matter of Devoe Mfg. Co.*, 108 *U. S.* 401, 406–10, 2 *S. Ct.* 894, 27 *L. Ed.* 764 (1883); *State v. Babcock*, 30 *N. J. L.* 29 (Sup. Ct. 1862); *Central RR. of N. J. v. Jersey City*, 70 *N. J. L.* 81 (1903), a concise presentation of its history may be found in *Bard*, *supra*, footnote 2, at 5–24.

> of money, and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans. . . . [*N. J. S. A.* 32:1–1]

While the Compact delineated the framework for the Port Authority and its operations, the necessity for a more specific implementation was recognized in Article X, which directed the state legislatures to adopt "a plan or plans for the comprehensive development of the port of New York" "as soon as may be practicable." *N. J. S. A.* 32:1–11. The formulation of this plan was undertaken by the Authority's initial board of commissioners, whose *Report with Plan for the Comprehensive Development of the Port of New York, December 21, 1921* (1921) was eventually enacted as the Comprehensive Plan mandated by the Compact.[4]

This plan envisioned an active and affirmative role for the Port Authority in the development of the Port District.[5] Section 8 of the Comprehensive Plan provided:

> The Port of New York Authority is hereby *authorized and directed to proceed with the development of the port of New York* in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. [*N. J. S. A.* 32:1–33; emphasis supplied]

That fulfillment of this statutory mandate contemplated the involvement of the Port Authority in transportation matters of the Port District is undeniable. This responsibility, for

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[4]The Comprehensive Plan was enacted in *L.* 1922, *c.* 9, now contained in *N. J. S. A.* 32:1–25 *et seq.* New York approved the Comprehensive Plan in *Laws of New York* 1922, *c.* 43, now found in *N. Y. Unconsol. Laws* § 6451–68 (McKinney (1961)). Congressional consent was secured in *S. J. Res.* of July 1, 1922, *c.* 277, 42 Stat. 822.

[5]The metes and bounds of the Port District are defined in *N. J. S. A.* 32:1–3.

example, was explicitly mentioned in that portion of the preamble of the Compact cited above. Article XXII of the Compact further clarifies this responsibility by defining "transportation facility" as including:

> . . . ***railroads***, steam or electric, motor truck or other street or highway vehicles, tunnels, bridges, boats, ferries, carfloats, lighters, tugs, floating elevators, barges, scows or harbor craft of any kind, aircraft suitable for harbor service, and every kind of transportation facility now in use or hereafter designed for use for the ***transportation or carriage of persons or property***. [*N. J. S. A.* 32:1-23; emphasis supplied]

The centrality of the railroads to the organizational and coordination schemes of the Port Authority was highlighted by the separate definition of "railroads."[6] This was a reflection of the final report by the New York, New Jersey Port and Harbor Development Commission, which in 1920 had recommended the establishment of a bi-state agency with appropriate jurisdiction. See footnote 2, *supra*. The report, whose factual findings served as the basis for the Compact and the Comprehensive Plan, found the commercial inadequacies of the metropolitan area to be "primarily a railroad problem." The absence of railroad coordination and accessibility at many places within the district consequently required "essentially a railroad plan." The Commission summarized its suggestions in a proposal which entailed the establishment of railroad beltline systems between New Jersey and New York, and concluded:

> This remodeled terminal railroad system, bringing every railroad of the Port to every part of the Port, and thus giving every part of the Port opportunity to develop and to have the economical transportation service needed for its commercial and industrial growth and expansion, constitutes the comprehensive plan of the Commission — the plan which the Commission recommends for formal adoption by the two states. [New York, New Jersey Port and Harbor Development Commission, *Joint Report*, *supra* footnote 2, at 3]

[6] *N. J. S. A.* 32:1-23 provides:

> "Railroads" shall include railways, extensions thereof, tunnels, subways, bridges, elevated structures, tracks, poles, wires, conduits, powerhouses, substations, lines for the transmission of power, car barns, shops, yards, sidings, turnouts, switches, stations and approaches thereto, cars and motive equipment.

This statutory responsibility to develop the transportation facilities of the Port District, and particularly facilities relating to railroad operations, contained an implicit obligation to foster passenger transportation service. Although the Port and Development Commission report concentrated on the freight shipment needs of the area, it did not preclude a comparable role for the Port Authority in passenger service. With one notable exception, the Port Authority's role in passenger service is confirmed by the early history of the agency. In this regard, however, even that exception, the 1928 veto message of Governor Alfred E. Smith of New York which rejected a New Jersey proposal for the development of a rapid transit system between the states, may be no more than a personal predilection.[7] See 134 *N. J. Super.* at 149. Noting that the Port Authority should "stick to this program . . .[for] the solution of the great freight distribution problem," Governor Smith at no time denied the agency's power to deal with passenger service, and only suggested a reordering of its priorities. More importantly, the position which he advocated was expressly repudiated by the Port Authority that same year. In a June 11, 1928 resolution supporting the continuation of a Suburban Transit Engi-

[7] Governor Smith, in what remains the only major statement questioning a Port Authority role in passenger traffic, remarked:

> I am satisfied that the Port Authority should stick to this program, and I am entirely unwilling to give my approval to any measure which at the expense of the solution of the great freight distribution problem will set the Port Authority off on an entirely new line of problem connected with the solution of the suburban passenger problem.

Veto Message, *Public Papers of Governor Alfred E. Smith of 1928*, 187-88 (1938).

neering Board,[8] the Port Authority recognized that it had a responsibility to the metropolitan commuter, based on its broader duty to develop transportation in the Port District:

> The Commissioners of the Port Authority have found in their studies that no adequate or effective interstate transportation development can take place without taking full account of *transportation of passengers* as well as of freight throughout the Port District.[9] [Emphasis supplied]

B. *Port Authority Involvement in the Area of Mass Transit; Reports, Studies and Legislation Concerning Mass Transit*

The continuance of its role in mass transportation has been reaffirmed by the Port Authority from time to time. The obligation to provide for passenger service within the

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[8]The Suburban Transit Engineering Board had been created in response to a Port Authority suggestion in its 1927 Annual Report. As that report stated:

> It is our opinion that, in the long run, the greatest progress will be attained by having this Engineering Board undertake the responsibility for the preparation of the engineering section of a comprehensive suburban transit plan for the entire port district. The Port of New York Authority, *Annual Report for 1927*, 56 (Jan. 20, 1928).

Parenthetically, it should be noted that this body was the intended recipient of the funds which Governor Smith vetoed. The Port of New York Authority, *Annual Report for 1928*, 63 (Dec. 31, 1928).

[9]*Annual Report for 1928*, *supra* footnote 8, at 64–66. The Port Authority answered more directly the fears expressed by Governor Smith in a subsequent part of its June 11, 1928 resolution:

> The Commissioners of the Port Authority are satisfied from the reports of their staff that continuance of the work of the Suburban Transit Engineering Board and the participation therein by members of the staff of The Port of New York Authority will not at this time divert any of their efforts away from the effectuation of the statutory Comprehensive Plan nor from their duties in the field of protecting the Port nor from any other pending work of the Port Authority, but on the contrary, the continuance of such Suburban Transit Engineering Board's work will facilitate the other work of the Port Authority. [*Id.* at 65]

Compact's injunction to the Post Authority has not only been acknowledged by those whose occupations and interests are related to the transportation field,[10] but by ranking members of the Port Authority staff as well. For example, the following colloquy between Assemblyman J. Edward Crabiel and the Port Authority's then Executive Director Austin J. Tobin occurred at a 1958 legislative hearing:

> ASSEMBLYMAN CRABIEL: Mr. Tobin, just to clear my mind on certain key points — I have been reading your report and listening to your talk — there is no question that, as far as the compact between the two states is concerned, *the Legislatures could direct the Port Authority to do rapid transit and that that would be within their compact.*
>
> MR. TOBIN: *Yes sir. There's no question about it.* [*Hearings on Assembly Bills No. 16 and 115 and Senate Bill No. 50, supra* footnote 10, Nov. 24, 1958, at 44] (emphasis supplied).

The manifestations of this responsibility have been insignificant such as the separate sections which the Authority devoted to "Suburban Transit" in its earlier Annual Reports (a practice by the way, which has been resumed since the Port Authority's acquisition of the H & M railroad in 1962). See T. W. Kheel & R. J. Kheel, "The Port Authority 1962 Covenant — Bar to Mass Transportation," 27 *Rutgers L. Rev.* 1, 5(1973); The Port of New York Authority, *Annual Report for 1923*, "Commuter Passenger Traffic," 35–36 (Jan. 19, 1924); *Annual Report for 1924*, "Congestion of Passenger-Traffic," 23–24 (Jan. 24, 1925); *Annual Report for 1929*, "Suburban Transit," 27–28 (Dec. 31, 1930). More indicative, however, of the Port Authority's

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[10]See *Hearings on Assembly Bills No. 16 and 115 and Senate Bill No. 50 before N. J. Assembly Comm. on Fed. & Interst. Rels. and Assembly Comm. on Highways, Transp. and Pub. Utilities*, Nov. 24, 1958, at 18A (Statement of Augustus S. Dreier, Counsel, Inter-Municipal Group for Better Rail Service); Dec. 3, 1958, at 22-A (Statement of Herman T. Stichman, Trustee, Hudson & Manhattan Railroad) (hereinafter referred to as Assembly Hearings); *Caro, The Power Broker Robert Moses and The Fall of New York*, 922–23 (1974).

role in rapid transit operations have been the infrequent reports which it has issued on this subject.[11] The representativeness of at least 14 of these reports cannot be premised on any successful projects which they have stimulated or realized. As frankly admitted by Edward J. O'Mara, a chairman of the Metropolitan Rapid Transit Commission (a Port Authority-funded investigative agency which itself produced an unsuccessful series of legislative proposals):

> For at least 35 years, there has been a growing public awareness of the importance of mass transportation in the metropolitan region in the State of New Jersey. At least 14 more or less extensive studies have been made of the problem by various committees and commissions. Nothing has ever come of them, and in the meantime the problem has been becoming progressively more acute. [*Assembly Hearings*, Nov. 24, 1958, at 70A]

See also *2d Hearing before N. J. Sen. Comm'n (Created un-*

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[11]These reports have been conducted on a variety of topics and in conjunction with various other interested organizations. Some, though by no means all, of these studies have included a continuing study begun in 1927 of the suburban transit facilities to relieve traffic congestion in conjunction with a variety of other groups (pursuant to New Jersey legislative authorization, *L.* 1927, *c.* 277); a 1937 study entitled "Suburban Transit for Northern New Jersey (Mar. 1, 1937) concerning interstate and suburban passenger problems within the Port District and New Jersey in particular (undertaken pursuant to *L.* 1936, *c. J. Res.* No. 6); a continuation of studies begun in 1937 and the presentation of legislative proposals for implementing a new transit system (pursuant to *L.* 1938, *c. J. Res.* No. 1); a 1948 study concerning the development of a rapid transit system in Northern New Jersey which would link Newark Airport and New York City (undertaken pursuant to a request by New Jersey Governor Alfred E. Driscoll); 1948 study concerning the development of a north-south transit line in Hudson County (initiated at the request of the City of Bayonne); and the creation in 1952 of the Metropolitan Rapid Transit Commission to undertake a comprehensive study of the transit problems of the Port District (*L.* 1952, *c.* 194). By agreement reached in 1955, the Port Authority provided $800,000 when this last study was inaugurated. The Commission's report was released in 1958. In addition, the Port Authority in the early 1960's conducted a series of studies concerning the feasibility of its acquiring the operations of the H & M railroad, and later, the conditions under which the authority would do so.

der Sen. Res. No. 7 (1960) and Reconstituted under Sen. Res. No. 7 (1961)) to Study the Financial Structure and Operations of The Port of New York Authority, Jan. 27, 1961 (2d day), at 64–66 (Statement of Austin J. Tobin, Executive Director, Port of New York Authority). In this respect, these studies provide a broad overview of the historic approach of the Port Authority to the problems of urban mass transit. This background is particularly important because what the Court is truly asked to consider is the manner in which the Port Authority has dealt with the problems of mass transit in the Port District, and the attitudinal reluctance which has characterized its efforts in this area of transportation.

These studies, in conjunction with the annual reports which are issued by the Port Authority, possess several characteristics worth noting. First, virtually none of the studies resulted from the Port Authority's own initiative. Most of the studies were the product of either legislative or other governmental requests for pertinent information and proposals. See footnote 11, *supra*. While the failure to take affirmative administrative or investigatory action may not necessarily be indicative of an agency's abdication of responsibility in the case of the Port Authority, the failing is particularly suspect. This is because the duties expressly imposed on the Port Authority by the 1921 Compact were those to "make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted;"[12] and to suggest to the state legislatures recommended means to improve Port commerce.[13]

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[12]*N. J. S. A.* 32:1–12, which was contained in the original Compact as Article XI and which is indicative of a statutory mandate, provides:

> The port authority *shall* from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two states, they shall be binding upon both states with the same force and effect as if incorporated in this agreement. [Emphasis supplied]

[13]*N. J. S. A.* 32:1–13 provides:

> The port authority may from time to time make recommendations to the legislatures of the two states or to the congress of the

Second, none of these studies contains an expressed commitment (much less a recommendation of such a commitment) by the Port Authority to undertake the construction or implementation of a mass transit system. Instead, most of them recommend the assumption of these obligations by other governmental or quasi-governmental bodies and agencies. See The Port of New York Authority, *Suburban Transit for Northern New Jersey,* 10 (1937); The Port of New York Authority, *Annual Report for 1958,* 38–42. In conjunction with this, it should be noted that the Authority was one of the staunchest supporters of two New Jersey legislative proposals, S–50 and A–115, which were introduced and discussed in 1958. See *Assembly Hearings, supra,* Nov. 24, 1958, at 44, 49 (Statements of Austin J. Tobin, Executive Director, Port of New York Authority). Not surprisingly both of these measures presented plans for the establishment of an independent agency to handle matters relating to mass transportation. Conversely, the Port Authority was strongly opposed to a companion proposal, A–16, which would have authorized the agency itself to develop, improve and coordinate the rapid transit facilities in the Port District. *Assembly Hearings, supra,* Nov. 24, 1958, at 18–19 (Statements of Austin J. Tobin, Executive Director, Port of New York Authority).[14]

United States, based upon study and analysis, for the better conduct of the commerce passing in and through the port of New York, the increase and improvement of transportation and terminal facilities therein, and the more economical and expeditious handling of such commerce.

[14]On this point, a noted transportation expert, Michael N. Danielson, observed:

> A good many people in the New York area, particularly in New Jersey, could see no point in creating another agency, whether bi-state or tri-state, as long as the Port of New York Authority apparently possessed both the jurisdiction and financial capacity to tackle the regional rail problem. Time and again, the Port Authority fended off these forays, emphasizing that there was an "absolute incompatibility between railroad deficits and the PNYS'S contractual limitations with its bondholders . . . and to confine itself to self-supporting projects." [*Danielson, Federal-Metropolitan Politics and the Commuter Crisis,* 23 (1965)].

Finally, as previously noted, there has been a startling absence of tangible progress resulting from, or attributable to these investigatory efforts. This is true even though the Port Authority has recognized the commuter problems which beset the New York metropolitan area. As early as 1925, in its Annual Report, the Authority observed:

> While hundreds of millions of dollars have been spent in urban rapid transit during the past decade, no commensurate amounts have been expended on suburban rapid transit, and the commuter has reached the limit of his endurance where the trunk lines leading into New York City are incapable of handling both suburban and through traffic. The passenger service of every railroad in the Port District is taxed to its limit by the requirements of this service. There is barely room during the rush hours for the trains carrying freight because of the commuter service, while passengers and freight must both necessarily move during these hours. [The Port of New York Authority, *Annual Report for 1924,* 23 (Jan. 24, 1925)]

See also The Port of New York Authority, *Annual Report for 1927,* 10, 53 (Jan. 20, 1928). Over the years, this recognition has increased with its realization of the expanding dimensions of commuter congestion and the inability of private transit facilities to cope with the problem. The Port of New York and New Jersey, 1972 *Annual Report,* 10–15 (1972); 1973 *Annual Report,* 10–15 (1973); 1974 *Annual Report,* 4–6 (1974).

The Port Authority's ineffectual investigative efforts cannot be justified due to a theoretical lack of jurisdiction in mass transit operations. Such jurisdiction was given to the agency in the Compact of 1921. Nor is the lack of success due to the financial inability of the Port Authority to assume additional obligations. As the trial court found, the Authority is not only financially sound, but has suffered no detrimental effects from the repeal of the protective 1962 Covenant:

> Suffice it to say that between 1962 and 1974 the security afforded bondholders had been substantially augmented by a vast increase in Authority revenues and reserves, and the Authority's financial ability to absorb greater deficits, from whatever source and without any

significant impairment of bondholder security, was correspondingly increased. [134 *N. J. Super.* at 194–95]

Rather, the limited effectiveness of these studies is merely symptomatic of an underlying limitation which the Port Authority has imposed on its own involvement in mass transportation. This limitation, which is derived from a narrow construction of its statutory powers, precludes an undertaking by the Authority unless the relevant project will be financially self-supporting, or will only generate deficits within conservatively defined limits. While the definition of the limitation is presented in purely financial terms, its effect has been to severely restrict the scope of activities in which the agency may engage. Because the majority of mass transportation facilities are closely associated with high deficits, the practical operation of the Port Authority's self-imposed restriction has prevented the Authority from fulfilling its rapid transit obligations.

C. *History of the Self-Supporting Concept*

While the provisions of the Compact and Comprehensive Plan sketched a broad authorization in terms of the activities which were within jurisdiction of the Port Authority, the powers accorded to it were not commensurate with its tasks. Without the necessary power, the Authority could not unilaterally support its statutory mandates, much less initiate action in their behalf:

> An impressive body of activities was thus laid out wherein the Port Authority could formulate the needs of the port as a whole and be vigilant to protect its interests. It would serve as a focus and agent of the forces of unity within the port. The primary requirement in this field would not be legal power but adequate funds and continuous application. The Port Authority never lacked support with respect to the former, and was well conceived to function with respect to the latter. But success along this line of endeavor would depend upon cooperation from public agencies and private interests. Where conflicts developed it could make progress very slowly, if at all. [*Bard, supra*, footnote 2, at 58–59]

As a result of setbacks incurred in early legal skirmishes with the powerful railroads in the 1920's, the Port Authority appeared to assume a less assertive role in the port's development than that anticipated by its proponents. Reluctant to promote otherwise desirable activities within the Port District, the Authority restricted its goals to the dubious task of maintaining a balanced budget. The difficulty of this objective was compounded by the fact that under both the Compact and the Comprehensive Plan, the Port Authority had been denied the power to either levy assessments or pledge the credit of either state. *Annual Report for 1954*, vi (1954). Consequently, to offset the costs and losses which it incurred, the agency was dependent upon the revenues which it realized from its various projects and facilities.

While this new objective in the early years of the Port Authority was tempered by a "rule of economic practicability," The Port of New York Authority, *Annual Report for 1926*, 5 (Jan. 20, 1927), its importance was later elevated by the increased emphasis placed on self-sufficiency. In other words, because the fiscal stability of the Port Authority was dependent upon the revenues of its facilities, it was necessary for all projects to demonstrate their self-supporting capacity before the Authority would undertake their implementation. Thus, James C. Kellogg, III, the then Vice-Chairman of the Port Authority, read from a prepared statement before a Senate Commission in 1960, as follows:

> In order that the Port Authority might carry out the tremendous and continuing task of developing the public terminal and transportation facilities of this metropolitan area, the two Legislatures clothed it with all necessary and appropriate powers of port and terminal development, with the important exception of the power to tax or to levy assessments. This reservation is the key to the whole concept of the Port Authority, which is that of a self-supporting agency, whose public projects are carried on through the development of their own revenues and charges, and which imposes no burdens on the general taxpayer. [*Hearings before N. J. Sen. Comm'n Created under Sen. Res. No. 7 (1960) to Study the Financial Structure and Operations of the Port of New York Authority*, September 27, 1960, 7–8 (Statement of James C. Kellogg, III, Vice-Chairman of the Port Authority)].

The objective of a self-supporting authority, while salutary in principle, was inconsistent with the Port Authority's original objectives and early history. In its annual report for 1924, the Authority explicitly rejected the self-supporting concept as a basis for its operations:

> **Preferably, and in the main, therefore, the Port Authority regards itself rather as the guardian and guide of the Port District, protecting it against attacks both from within and without, and directing its activities and developments with a view to procuring the greatest cooperation of existing agencies, the utmost efficiency and the minimum of cost. *If such is to be its primary function it should not be expected to be self-supporting.* [The Port of New York Authority, *Annual Report for 1924*, 9–10 (Jan. 24, 1925); emphasis supplied]**

Moreover, the self-supporting concept as a fundamental precept of the Port Authority's financial scheme is belied both by the projects which it embarked upon after its creation and by subsequent developments in its financial structure. As the trial court observed, because of the heavy investment required by these early projects, the Port Authority was confronted with large deficits from the outset. 134 *N. J. Super.* at 140. However, rather than restricting the Authority's activities, New Jersey and New York encouraged such projects by advancing funds, transferring control of lucrative facilities (such as the Holland Tunnel) to the Authority, and permitting the Authority to issue "open-ended" bonds. This latter device, in particular, helped free the Port Authority from absolute reliance on self-supporting projects. By placing all revenues derived from the sale of open-ended bonds into a common fund, the Port Authority was able to free deficit operations from the inadequate sales of their particular bonds. *Goldberg, A History of the Port of New York Authority Financial Structures,* 5 (1964). The pooling of resources not only permitted the Port Authority to finance debt-ridden facilities through those which were profitable, but simultaneously afforded bondholders a certain degree of security regardless of the success or failure of any given project. The open-ended financing of the Port

Authority, which was originally introduced in the form of the General Reserve Fund (*N. J. S. A.* 32:1–142), literally, the pool into which all funds were paid, was later expanded by the Authority's adoption of the Consolidated Bond Resolution in 1952. This resolution, which abandoned the practice of earmarking funds for specific projects, authorized the issuance of bonds whose revenues would be designated by the Authority for a given project according to its needs. As the trial court found, the resolution obviated any further concern for maintaining the self-supporting concept as a prerequisite to Port Authority involvement in a project:

> **With the adoption of the CBR the "self-supporting" facility concept which had governed earlier authority financing ceased to have the significance previously attached to it; for under the CBR the Authority's financial structure is based on a unitary enterprise concept and all revenues from all facilities are pooled. Individual facilities are not financed independently of the rest of the Authority. The facilities contribute their revenues for debt service on all Authority bonds according to their earning power and without regard to the amount of bonds issued for the construction of any particular facility. [134 *N. J. Super.* at 143]**

Enactments such as the General Reserve Fund and the Consolidated Bond Resolution created the possibility for the involvement of the Port Authority in traditionally deficit operations such as mass transportation. Nonetheless, the translation of this new financial freedom into practical action was not forthcoming from the Port Authority:

> **That cashbox, so long empty, was full now, thanks to the postwar traffic boom, . . . the Port Authority's was worth $700,000,000. Long on cash, moreover, the Port Authority was short on dreams. The visionaries who had created it were long gone from its councils; Julius Henry Cohen had been replaced by money men like Cullman and Colt and Pope whose eyes were brightened by the balances in the Authority's ledgers, not by the potentialities for improving the common weal that those balances represented. The purpose for which the Authority had been created — the development of an *overall* transportation system to knit together a great port — had been lost sight of for years. Plans the Authority had aplenty, of course, but unrelated plans, plans for individual projects, joined by no link other than the fact that their construction would return the agency profit. [*Caro, supra*, footnote 10, at 922–23]**

The resultant program which the Port Authority pursued represented less of an integrated effort to organize and coordinate the commerce of the port of New York, and more of an administrative mish-mash with little cohesiveness or relation to the agency's statutory mandate. Thus, construction of a World Trade Center, with little or no relation to the activities for which the Port Authority was created, was suddenly elevated to an importance which transcended that of a more traditionally-regarded responsibility of the Authority such as mass transportation.

The underlying rationale for these actions was unmistakably attributable to retention of the self-supporting limitation to which the Port Authority had previously adhered. This was made clear by Executive Director Tobin of the Port Authority when questioned at a 1958 hearing about the manner in which future revenues and reserves would be committed:

> Well, it is closed unless those future bond issues have to do with projects that can be made self-supporting and in which the Commissioners of the Port Authority will not only certify as *a matter of conscience* and a matter of record that they believe that they can be made self-supporting and will add to the general credit of the Port Authority; but also if they can demonstrate arithmetically on sound projections of its existing net revenues and its maximum future debt service that those projects will not hurt this bondholder. That's all he has. If that bondholder has an open end bond without those restrictions, he has a piece of paper. [*Assembly Hearings, supra*, November 24, 1958, at 38 (Statement of Austin J. Tobin, Executive Director, Port of New York Authority); emphasis supplied]

This self-limitation has exacerbated the Port Authority's demonstrated lack of initiative. For example, although the Port Authority in 1955 agreed to provide the Metropolitan Rapid Transit Commission with $800,000 for that body's study of a metropolitan scheme of mass transit, the price which the Authority extracted for its financial support was a "Memorandum of Understanding" which precluded its own role in any deficit operations which the Commission

might recommend. *Danielson, supra* at 23; *Assembly Hearings, supra*, December 3, 1958, at 91–A to 92–A (Statement of Frank H. Simon, Executive Director, Metropolitan Rapid Transit Commission). More importantly, perhaps, the Port Authority's inertia has interjected itself in the relationship between the agency and the Legislatures which it allegedly serves. This has been done in an often contradictory fashion as illustrated by the following discussion between Assemblyman Crabiel and Executive Director Tobin:

> ASSEMBLYMAN CRABIEL: What I'm getting at here is, you're saying categorically that you cannot take a deficit. Now, I'm raising the point that as far as the Legislatures of the two states, when they established the compact there was nothing in the compact and nothing in the instructions from the Legislatures to the Port Authority that they could not undertake a deficit operation.
>
> MR. TOBIN: Well, excuse me, sir. I'd say that there was. I would say that the way the statutes are phrased, it could undertake nothing except a self-supporting operation. We have no way of financing anything but a self-supporting operation.
>
> ASSEMBLYMAN CRABIEL: Well how do you account for the fact, then, that you have operated deficit operations?
>
> MR. TOBIN: Because the pooled revenues have been sufficient. Because we believed also, when we went into those, that they could be self-supporting and we were wrong.
>
> ASSEMBLYMAN CRABIEL: That's what I was pointing up. [*Assembly Hearings, supra*, November 24, 1958, at 45]

III

THE ROLE OF THE PORT AUTHORITY

Ultimately, those who are most hurt by the Port Authority's failure to enter the field of mass transportation are, of course, the commuters. Absence of Port Authority initiative in this area is a direct reflection of the deficits which are inherent in the provision of this public service:

> Until the late 1950's, transit operations in the United States were generally profitable and, consequently, attractive to investment. Decline in patronage and increasing labor and equipment costs have completely reversed this trend to a point where today, public transit in its everyday operations in most cities is a losing proposition. The losses are not as great as sometimes presumed but, in most

cases, average between 20 and 25 percent annually. Therefore, public transit — like many other sectors of the transportation industry, including private automobile transportation — now requires substantial public support in the form of direct financial subsidies to be capable of rendering necessary services. [Roeseler and Levi, "State Subsidies for Public Transit: An Overview of Current Legislation," 4 *Urban Lawyer* 59, 60 (1972)]

See also Kneafsey and Edelman, "A Market-Oriented Solution to the Northeast Railroad Dilemma," 41 *I. C. C. Pract. J.* 174 (1973–74). This problem concerning the financial weaknesses of mass transit facilities has been realized within the New York metropolitan area. This, no doubt, has resulted from both the unusually heavy demands which have been placed on these systems in the Port District, and the lack of a perceived common interest among the District's geographic and political components. *Danielson, supra*, at 21–22.

The Port Authority's failure to assume an active role in solving this problem has had a concurrent effect on the traveling habits of the average commuter. Faced with increasing service cutbacks and escalating fares, the commuter is left with fewer alternatives to the private automobile. Grubb, "Urban Transportation Alternatives to the Automobile," 39 *I. C. C. Pract. J.* 19 (1971–72); Cooper, "Prospects for a Mass Movement to Public Transit," 5 *Urban Lawyer* 679 (1973). His increasing resort to this mode of transportation in turn has caused a drastic increase in traffic congestion and air pollution which are commonly associated with the metropolitan area.

These problems have stimulated legislative responses on both the federal and state levels. The federal response consists primarily of the Urban Mass Transportation Act of 1964, 49 *U. S. C. A.*, § 1601 *et seq.*, which purports to encourage "the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private." 49 *U. S. C. A.*, § 1601. See Haley and Watkins, "The Urban Mass Transportation Assistance Act of 1970 — A Federal Program Comes of Age," 16 *N. Y. Law For.* 741 (1970). As a corollary to the urban mass transit crisis, the federal government has enacted the Clean Air Act, 42 *U. S. C. A.*, § 1857 *et seq.* Similar considerations produced comparable legislation in New Jersey. Emergency Energy Fair Practices Act of 1974, *L.* 1974, *cc.* 2, 6; Executive Order No. 1 (Feb. 5, 1974).

These legislative enactments were most recently recognized in a report issued by the Joint Transportation and Communications Committee of the New Jersey Legislature, *Report of the Senate and General Assembly Joint Transportation and Communications Committee (Pursuant to Assembly Concurrent Res. No. 211 of 1974)*, October 6, 1975. As the report noted:

> The legislation passed by New Jersey during the last four years clearly reflects the determination on the part of its officials to direct the Port Authority towards making a greater financial commitment to mass transit. In order to determine whether New Jersey has been treated by the Port Authority in a fair and impartial manner the Committee has investigated the degree of Port Authority responsiveness to meeting the mass transportation needs of the State. [*Id.* at 13]

The Committee's conclusion was succinct as it was unfortunate:

> The Committee recognizes that the Port Authority has acquired a reputation for its engineering, planning and management skills. It is the conclusion of the Committee, however, that in the area of mass transportation the Port Authority's performance has not been satisfactory. [*Id.* at 17]

The Committee's conclusions were premised upon the same type of factors which I have considered above. While the Committee was hopeful that the Port Authority would take its mass transportation responsibilities "more seriously" in the future, it nonetheless pledged "its vigilance to see that the

Port Authority completes the mass transportation projects it has promised to complete." *Id.* at 18, 19.[15]

The sensitivity of the state government to the urgent need for more modern means of public transportation has not been confined to the legislative branch. In his recent "State of the State" address, Governor Byrne not only recognized this problem, but concurrently cited the Port Authority's responsibility for its solution. Perhaps even more important, the Governor indicated his willingness to impose an affirmative sanction on the Port Authority should the desired action in the area of mass transit not be forthcoming:

> **How do we keep the railroads running at a time when the state subsidy program costs over $100 million a year and has been growing by more than 35 per cent a year? Should there be an overall operating agency for these lines? What about the communities and industries served by lines soon to be abandoned? Where can we find the $255 million required to match federal funding for the modernization of two major commuter lines and the extension of PATH to Plainfield?**
>
> **The Port Authority of New York and New Jersey must increase its commitment to these efforts. If it is unwilling to do so, we will insist that it rescind the toll increases instituted last year for the specific purpose of funding improvements in the public transportation system.** [Annual Message of Governor Brendan T. Byrne, Jan. 13, 1976, at 19]

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[15] While the history of the Port Authority's involvement in mass transportation has been discouraging, the prospects for renewed efforts by the agency in this area of endeavor are hopeful. In the above cited report by the Legislature's Joint Transportation and Communications Committee, the development of a mass transportation plan by the Port Authority was noted. ***Report of the Senate and General Assembly Joint Transportation and Communications Committee (Pursuant to Assembly Concurrent Res. No. 211 of 1974***, 16–17 (October 4, 1975)). This plan committed the Port Authority to the provision of additional direct rail service to Penn Station in New York City for New Jersey commuters, the expansion of the Midtown Bus Terminal, the construction of a rail link to Kennedy Airport and the extension of the PATH system from Newark to Plainfield. Although the Urban Mass Transportation Administration on December 19, 1975 rejected New Jersey's request for $278-million to construct the PATH extension, the State's expressed intention to reapply for such funds will create the possibility of a continued role for the Port Authority in mass transportation. ***The Sunday Star-Ledger***, December 21, 1975, at 1, 8; ***The New York Times***, December 22, 1975, at —; ***The New York Times***, January 4, 1976, at 34. This persistence has apparently been successful as federal approval of a $400-million block grant for the PATH extension to Plainfield and other mass transit projects is anticipated. ***The Star-Ledger***, February 10, 1976, at 1.

I, too, would similarly take this opportunity to demonstrate the vigilance which has motivated the Joint Committee and the Governor. The Port Authority has too long neglected the responsibility with which it was statutorily charged in 1921. In *So. Burlington Cty. NAACP v. Tp. of Mt. Laurel*, 67 *N. J.* 151, 189 (1975), we recognized the significance of transportation to the overall development of an urban area. I would today reaffirm this significance.

IV

CONCLUSION

The relief which I recommend today is intended as an answer to a problem which has assumed crisis proportions. The Port Authority is the producer, the director and the main character of the play known as "The Disease of Mass Transportation." This malady has suffered too long from the benign neglect of public agencies such as the Port Authority, and such neglect has permitted the disease to spread unattended. The resulting state of affairs may most accurately be described as one of emergency. While the appellation "emergency" was at one time reserved for calamitous and natural occurrences, the inadequate and deteriorating quality of mass transit in the metropolitan area has had an eroding effect on the urban environment in which it operates. This effect has been measurable not only in terms of the unending lines of commuters who have been inconvenienced by inefficient service, but also in terms of traffic congestion with its attendant pollution as well. The courts of this country have long recognized that such emergent circumstances may

serve as a mandate to administrative action. "While emergency does not create power, emergency may furnish the occasion for the exercise of power." *Home Building & Loan Ass'n v. Blaisdell*, 290 *U. S.* 398, 425–26, 54 S. Ct. 231, 235, 78 *L. Ed.* 413, 422 (1934); *Hourigan v. North Bergen Tp.*, 113 *N. J. L.* 143, 148 (E. & A. 1934).

For an Authority that is long on cash and short on dreams,[16] it is time to respond for those who have long suffered the inconvenience and expense which have resulted from the Port Authority's inaction.

I would order the Port Authority, its Commissioners and its Executive Director to not only complete those projects to which it is already committed, but to formulate and present plans and suggestions for a regional mass transportation scheme to the Legislatures of New York and New Jersey. Implicit in this would be the requirement that such efforts be completed in an expeditious fashion and within a fixed period of time. This injunction is necessary to bring home the importance of Authority action in the face of the current transportation crisis.

In proposing this relief, I should not be understood as advocating usurpation of the functions of either the executive or legislative branches of government. The majority's characterization of my position is in error. (At 259). My disposition does not contemplate ordering either the Governors or the Legislatures of the States of New Jersey and New York to undertake any particular course or courses of action. I would be loathe to intrude upon the relationships which have developed between these other branches of state government and the Port Authority. Nonetheless, I am all too aware of the fact that expertise in the field of mass transit operations resides in the body which was originally vested with both power and jurisdiction in that area, namely the Port Authority. By according the Authority a statutory mandate to

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[16] *Caro, supra, footnote* 10 at 922.

undertake mass transportation projects, it was anticipated by both States that the Port Authority would actively research, promote and recommend projects to be authorized and implemented by the State Legislatures. It is precisely the Port Authority's reluctance to utilize its expertise that has frustrated this basic first step towards the development of a much-needed integrated mass transportation system in the metropolitan area. Therefore, I would order the Port Authority to proceed with this initial planning stage, while, at the same time, acknowledging that ultimate adoption and implementation of the resultant plans remain a legislative and executive prerogative. The declared willingness of those branches of government to adopt appropriate measures leaves me confident that only timely suggestions by the Port Authority are needed to point the direction towards improved mass transit operations.

Although I am unsure whether it is the perception of my suggested order as a usurpation of executive and legislative function which underlies the majority's disagreement with such relief, I am, nonetheless, clear in my opposition to the lesson in civil procedure which the majority would impose on this case. I find that the majority's exercise of power under a writ of *mandamus* would ill-befit a remedy with such a Marshallian association. *Marbury v. Madison*, 5 *U. S.* (1 Cranch) 137, 2 *L. Ed.* 60 (1803). This is a direct result of not only the restrictive but the erroneous construction which the majority gives to the powers implicit in a *mandamus*. The writ of *mandamus* is a remedial process whose essential function is to compel the performance of a ministerial action *or the exercise of a discretionary function*. *Roberts v. Holsworth*, 10 *N. J. L.* 57 (Sup. Ct. 1828); *Switz v. Middletown Twp.*, 23 *N. J.* 580 (1957). This mode of relief is particularly appropriate with regard to recalcitrance by public officials or authorities. *Bd. of Taxation v. Belleville*, 92 *N. J. Super.* 338, 340–41 (Law Div. 1966). While the court has the power under a *mandamus* to compel action, it does not similarly have the power to control discretion in the performance of

the designated action. Such discretion properly resides in the functioning authority.

By its construction of the *mandamus,* the majority would not only accord the authority discretion in the manner of performing the compelled action, but would permit the authority discretion as to whether the ordered action should be performed at all. Although the majority has recognized that the Port Authority has resisted efforts to promote its involvement in mass transportation, it would consider this to be an exercise of discretion which would preclude a *mandamus* or an order similar to the one which I have suggested:

> As we have sought to demonstrate, the circumstances before us do not at all invite or accommodate the remedy proposed. This is so because the Authority (whose function is clearly not ministerial) has in fact exercised its discretion, even though that exercise has resulted in the rejection of a policy favoring mass transportation. Being a judgment decision its wisdom may be open to dispute; but as to the propriety of this Court's refusal to intrude on the underlying policy determination, there can be no question in the circumstances before us [At 259].

I cannot subscribe to such reasoning, whose circular nature would undercut the relief which the majority otherwise feels warranted under the circumstances and which would effectively emasculate the *mandamus,* or any similar relief, as a remedy.

I reject the majority's approach to the problem of this case within a procedural context. We have been taught that there are no rights without remedies. By stripping us of our remedies, the majority is most assuredly divesting us of our rights. *Marbury v. Madison, supra,* 5 *U. S.* (1 Cranch) at 163, 2 *L. Ed.* at 69. Furthermore, we have long passed the days wherein cases were decided on the niceties of procedural technicalities. *Hodgson v. Applegate,* 31 *N. J.* 29, 43 (1959); *Edelstein v. Asbury Park,* 51 *N. J. Super.* 368, 385 (App. Div. 1958). There is no need to resurrect in this case another of these manifestations of by-gone days.

Even if I were to acknowledge the necessity of specifically resorting to a *mandamus* or its equivalent, I could not justify withholding such relief in this case; nor can I presently understand the distinction which the majority draws between the *mandamus* which they recommend and the order which I propose. Granting that mandamus is an "extraordinary remedial process," *Beronio v. Pension Comm'n of Hoboken,* 130 *N. J. L.* 620, 623 (E. & A. 1943), aff'g 129 *N. J. L.* 557 (Sup. Ct. 1943), I cannot see the unfortunate plight of the more than 30 million commuters who are dependent upon the Port Authority's transportation services annually, nor the Authority's benign neglect of their plight, as being anything less than extraordinary. This is particularly so where to adopt the majority's approach would permit the Port Authority to ignore the statutory responsibilities with which it was charged in 1921.

The majority in *Gaby v. Port of New York Authority* has been unwilling to take the action which I regard as imperative. From its disposition I must, therefore, respectfully dissent.

For affirmance—Justices MOUNTAIN, SULLIVAN and CLIFFORD and Judges CONFORD, CARTON and HALPERN—6.

Concurring in part and dissenting in part—Justice PASHMAN—1.

APPENDIX B

Decision of the Superior Court of New Jersey, Law Division, Bergen County

UNITED STATES TRUST COMPANY OF NEW YORK, ETC., PLAINTIFF, v. THE STATE OF NEW JERSEY, *ET AL.*, DEFENDANTS .

DANIEL M. GABY, PLAINTIFF, v. THE PORT OF NEW YORK AUTHORITY, *ET AL.*, DEFENDANTS.

Superior Court of New Jersey
Law Division

Argued April 8, 9, 1975—Decided May 14, 1975.

SYNOPSIS

Consolidated actions were brought concerning constitutional validity of legislation creating, and later repealing, a covenant between the States of New Jersey and New York and holders of bonds issued by the Port Authority of New York and New Jersey. Defendants filed counterclaim for declaration of validity of repealing legislation. The Superior Court, Law Division, Gelman, J. S. C., held that legislative enactments, such as the 1962 covenant whereby the States and Authority were precluded from applying Authority revenues and reserves for passenger railroad purposes unless permitted by criteria set forth in the covenant, can constitute a contract within meaning of the contract clauses of the State and Federal Constitutions, that not every impairment of a contract obligation or security for its performance runs afoul of the contract clause, that a State's inherent power to protect the public welfare may be validly exercised under the contract clause even if it impairs a contractual obligation so long as it does not destroy it, and that in view of emergent problems of air pollution, crises in mass transit and energy problems repeal legislation was a reasonable and valid exercise of the State's police power and was not prohibited by the contract clause of either the Federal or State Constitution.

Complaints dismissed; judgment for defendants on counterclaim.

Mr. Robert B. Meyner and Mr. Devereux Milburn (of the New York Bar) for plaintiff United States Trust Company (*Messrs. Meyner, Landis & Verdon,* attorneys; and *Messrs. Carter, Ledyard & Milburn,* attorneys; and *Mr. Donald J. Robinson* (of the New York Bar) *Messrs. Hawkins, Delafield & Wood,* attorneys).

Mr. Michael I. Sovern (of the New York Bar) and *Mr. Murray J. Laulicht,* special counsel for defendants (*Mr. William F. Hyland,* Attorney General of New Jersey, attorney; *Mr. Harold S. H. Edgar* (of the New York Bar) on the brief).

Mr. Theodore W. Kheel (of the New York Bar) and *Mr. Howard Stern* for plaintiff Daniel M. Gaby (*Messrs. Battle, Fowler, Stokes & Kheel,* attorneys, and *Messrs. Shavick, Stern, Schotz, Steiger & Croland,* attorneys).

Mr. Joseph Lesser (of the New York Bar) for defendant Port Authority of New York and New Jersey (*Mr. Francis A. Mulhern,* attorney); and *Mr. Patrick J. Falvey* (of the New York Bar). *Ms. Isobel E. Muirhead, Mr. Arthur P. Berg* (of the New York Bar), (*Mr. Vigdor D. Bernstein,* of counsel).

GELMAN, J. S. C. These are consolidated actions which have as their common subject matter the constitutional validity of legislation of this State creating, and later repealing, a covenant between the States of New Jersey and New York and the holders of bonds issued by the Port Authority of New York and New Jersey (Port Authority).[1] The

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[1]Under the terms of the Compact of 1921 creating the Port Authority, *N. J. S. A.* 32:1-1 *et seq.*, legislative action taken by one state

first legislative act in question, *chapter* 8 of the *Laws of* 1962, *N. J. S. A.* 32:1–35.50 (the 1962 covenant), authorized the Port Authority to construct the World Trade Center and to acquire and operate the Hudson & Manhattan Railroad Company. As part of the 1962 legislation the two States enacted a statutory covenant with each other and with the holders of certain Port Authority bonds whereby the States and the Port Authority were precluded from applying the Authority's revenues and reserves for passenger railroad purposes unless permitted by the criteria set forth in the statute. *N. J. S. A.* 32:1–35.55.

The 1962 covenant was repealed by chapter 25 of the *Laws of* 1974.[2] The complaint filed by the United States Trust Company challenges the constitutionality of the repeal act of 1974, and the Gaby complaint attacks the validity of the 1962 covenant. We turn, then, to the procedural history of these actions and the issues projected by the respective pleadings.

Procedural History

1. *The Gaby Action*

On May 16, 1972 plaintiff Daniel Gaby filed a class action complaint for a declaratory judgment that the 1962 covenant violated the Federal and State Constitutions. The complaint named as defendants the Port Authority, its commissioners and executive director, and the then Governor of New Jersey, William T. Cahill. On October 25, 1972, on

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affecting the powers and duties of the Port Authority is not effective until concurred in by the legislature of the other. *N. J. S. A.* 32:1–8. Statutory citations in this opinion will be limited to the applicable New Jersey statutes unless the context otherwise requires.

[2]In 1972 the Legislature had repealed the 1962 covenant as to all bonds of the Authority issued after the effective date of the act. *L.* 1972, *c.* 208; *N. J. S. A.* 32:1–35.55a. The act became effective upon the adoption of concurrent legislation by the State of New York on May 10, 1973. *Laws of N. Y.* 1973, *c.* 318. The validity of this legislation is not in issue in these proceedings.

the motion of the Attorney General of New Jersey, the complaint was dismissed as to former Governor Cahill. The Attorney General also moved to dismiss the complaint for failure to name as an indispensable party the Port Authority's bondholders. No disposition appears to have been made of the motion at that time.

The Gaby complaint alleges, among other things, that the residents of the State of New Jersey are dependent upon mass transit facilities and are adversely affected by the deterioration of such facilities within the District serviced by the Port Authority (the Port District). It is alleged that the Port Authority was created by the Compact of 1921 and consented to by the United States Congress[3] to assure "cooperation of the two states in the future development" of transportation facilities within the Port District, and that by virtue of the 1962 covenant, restricting the Port Authority's power to acquire or operate passenger rail transit facilities, the two states entered into a new "Compact" without the consent of Congress and in violation of *U. S. Const.*, Art. 1, § 10. The complaint further alleges that the 1962 covenant constitutes an unconstitutional surrender by the State of its sovereign powers "to protect the health, general welfare and safety of the people," and that it has impaired and obstructed existing facilities for the transportation of goods in interstate commerce, in violation of *U. S. Const.*, Art. 1, § 8.

Gaby asks for multifarious relief. Aside from seeking a declaration as to the unconstitutionality of the 1962 covenant, he asks the court to declare the covenant to be subject to repeal, and to direct the Port Authority to formulate and submit to the court a plan for the development of mass transit facilities within the Port District.

The Gaby action was pretried on February 22, 1973, at which time it was stipulated that the action could proceed

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[3]*Pub. Res. No.* 17, 67th Cong., 1st Sess. (42 *Stat.* 174).

as a class action without formal notice to the class represented by plaintiff. Thereafter both sides moved for summary judgment, and oral argument on the motions was heard on September 26, 1973. At the conclusion of the argument the court directed the parties to submit further briefs on the constitutional issues and on the question whether the bondholders were necessary parties to the Gaby action. Following conferences between counsel and the court, it was agreed the United States Trust Company should be permitted to intervene in the Gaby action as a party defendant to represent the interests of the bondholders in that action. An order to such effect was entered on December 18, 1973, and arguments were rescheduled on the motions for summary judgment.

Prior to the date fixed for the argument the prospects for the adoption of the repeal act became apparent, and further action in the Gaby case was stayed pending future legislative developments.

2. *The United States Trust Company Action*

The New Jersey Legislature completed action on the repeal act on April 22, 1974, and Governor Brendan T. Byrne signed the bill into law on April 30, 1974. On the same day United States Trust Company (U. S. Trust) filed its complaint on behalf of itself as the holder of Port Authority bonds, as trustee for certain designated issues of Port Authority bonds, and on behalf of all holders of consolidated bonds issued by the Port Authority. The complaint names as defendants the State of New Jersey, Governor Byrne and the Attorney General of New Jersey, and seeks a declaratory judgment that the repeal act violated the Federal and State Constitutions.

U. S. Trust alleges that it is the holder (for its own account and in a fiduciary capacity) of $96,000,000 of consolidated bonds issued by the Port Authority; that the Port Authority was intended, under the terms of the Compact approved by Congress, to be a self-supporting public

agency whose obligations were to be and are payable from its net revenues and certain reserve funds; that the 1962 covenant was enacted to protect the Port Authority's existing and future bondholders from the diversion of pledged revenues and reserves to finance deficit mass transit facilities and further to preserve the Port Authority's credit standing; that the Port Authority notified prospective purchasers of its bonds of the existence of the 1962 covenant and purchasers relied on the covenant in purchasing bonds issued by the Port Authority, and that the secondary market for the Port Authority consolidated bonds has been adversely affected by the repeal act.

The complaint alleges that the repeal act violates the "impairment" and "taking" provisions of the Federal Constitution, *U. S. Const.*, Art. I, § 10 and Amends. V and XIV, and the equivalent provisions of the New Jersey Constitution, *N. J. Const.* (1947), Art. IV, § VII, par. 3; Art. I, pars. 1 and 20.

The answer filed by defendants asserts several defenses among which the following may be briefly noted: (1) the repeal act constitutes a reasonable exercise of the police power by the State; (2) the 1962 covenant itself violated the Federal Constitution because of lack of congressional consent; (3) the repeal act does not constitute an "impairment" of the contract since the obligation of the Port Authority to pay its bondholders remains intact; (4) the bondholders were on notice of the reserved powers of the State to repeal the 1962 covenant, and (5) the repeal act was adopted as a police power measure to meet a transportation crisis affecting the health, safety and welfare of persons residing within the District. Finally, the answer asserts a counterclaim for a declaratory judgment that the repeal act is constitutional.

A consent order was entered pursuant to *R.* 4:32–1 in the U. S. Trust action directing that the action be maintained and defended as a class action by U. S. Trust on

behalf of all holders of consolidated bonds of the Port Authority, and that notice to the class be deemed to have been given by means of the media publicity which was disseminated when the action was instituted. On December 10, 1974 the Gaby and U. S. Trust actions were consolidated by order of the court.

The parties to the U. S. Trust action have filed a 366-page stipulation of facts, accompanied by exhibits covering all phases of the case with the exception of two issues: (1) whether the purchasers of consolidated bonds issued by the Port Authority after the adoption of the 1962 covenant relied in fact upon the existence of the covenant, and (2) whether the repeal of the 1962 covenant adversely affected the secondary market for Port Authority bonds. These issues were the subject of a trial on February 4, 5, 6, 7 and 11, 1975, and the court's findings on the issues will be set forth *infra*.

The Formation, Facilities and Financial Structure of the Port Authority.

1. *Formation and Facilities.*

In 1917 the States of New Jersey and New York established the New York, New Jersey Port and Harbor Development Commission (the Commission) to study the facilities and problems of the Port of New York and to recommend a plan for the future development of the Port.[4] The Commission filed its *Report*[5] on December 16, 1920

[4]The enabling legislation directed the commissioners to negotiate and agree upon a joint report recommending a policy for the states "to the end that said port shall be efficiently and constructively organized and furnished with modern methods of piers, rail and water and freight facilities * * *." The Commission was to work out "a comprehensive and adequate interstate and Federal port policy, to meet commercial needs in times of peace and the protection of the harbor and adjacent localities in times of war." *L.* 1917, *c.* 130.

[5]*Joint Report with Comprehensive Plan and Recommendations*, New York, New Jersey Port and Harbor Development Commission, 1920 (hereafter cited as the *Report*).

setting forth its findings, conclusions and recommendations. The core recommendation of the Commission was the creation by the two states of a common public agency by means of which the states would cooperate in the future development of the facilities of the Port in accordance with the comprehensive plan recommended by the Commission.[6] *Report* at 436. In discussing the legal precedents for the establishment by the States of an agency having a substantial impact on interstate commerce, the *report* stated:

> Permissive or restrictive, as the case may be, the power of Congress over the instrumentalities of interstate traffic is exclusive, when in a specific case it has been exercised. But this latter limitation, coupled with the broad police power of the State and its control of intrastate commerce, has left to New York and New Jersey a broad field within which they may act without express Federal consent. It is hoped, of course, by securing congressional approval of any plan which may be adopted, to avoid future conflict with the Federal authority over interstate unification and control of the Port. But for the present the States may act alone. [*Report* at 446]

Prophetically the Commission noted that

> [o]ur port problem is primarily a railroad problem. * * * Therefore the comprehensive plan to evolve which this Commission was created is essentially a railroad plan. With the proper network of rail facilities, the development of other terminal facilities can follow along rational lines * * *. A complete reorganization of the railroad system is the most fundamental physical need of the Port of New York. [*Report* at 3]

However, the railroad problem upon which the Commission focused was not that of passenger transit but the handling and distribution of freight and cargo into and out of the Port District, and the comprehensive plan recommended by the Commission addressed itself exclusively to the transportation and distribution, not of persons but of freight

[6]The recommendation for a Compact between the States was originally contained in the Commission's preliminary report submitted in 1918.

and cargo by rail, and to a lesser extent by ship and motor truck. In its 474 pages plus appendices the only significant discussion of passenger traffic in the *Report* is contained in the section dealing with ferries and vehicular tunnels. After noting that the bulk of interstate passenger traffic was accommodated by the Hudson River ferries and that the impact of the Holland Tunnel (started in 1920) could not be forecast, the *Report* opined:

> Vehicular tunnels offer little promise as a means of conveying passengers, and the one rapid-transit facility in existence between the two States, while operated to near capacity, is not sufficiently profitable to warrant optimism that others will be built. [*Report* at 330]

Following the submission of the Commission's *Report*, the Port of New York Authority[7] was created pursuant to an interstate compact, signed April 30, 1921, between the States of New Jersey and New York. *N. J. S. A.* 32:1-1 *et seq.* The consent of Congress "to each and every part and article" of the Port Authority Compact was obtained effective August 23, 1921. *Pub. Res. No.* 17, 67th Cong. 1st Sess. The preamble of the Port Authority Compact states that "a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey," and that "the future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money, and the cordial co-operation of the States of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans."

Article I of the Compact contains the agreement and pledge by the two states of their "faithful co-operation in

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[7]The name of the Port of New York Authority was changed to the Port Authority of New York and New Jersey on July 1, 1972. *N. J. S. A.* 32:1-4.

the future planning and development of the port of New York, holding in high trust for the benefit of the nation the special blessings and natural advantages thereof". Article II defines the Port of New York District, comprising an area of about 1500 square miles in both states within a radius of about 25 miles from the Statue of Liberty. Article III establishes the Port Authority as "a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress." Article VI vests in the Port Authority "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within [the Port] district"; to make charges for the use of such facilities, and "to borrow money and secure the same by bonds or by mortgages upon any property" held by the Port Authority. Article VII provides that the Port Authority "shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other," and mandates that the Port Authority shall not pledge the credit of either State except with the consent of its legislature. Article XI requires the Port Authority to make plans for the development of the Port District supplementary to or amendatory of any plan theretofore adopted, and Article XII authorizes the Port Authority to "make recommendations to the legislatures of the two states or to the congress of the United States, based upon study and analysis, for the better conduct of the commerce passing in and through the port of New York."

Article XXII of the Compact defines "transportation facility" to include "railroads, steam or electric * * * and every kind of transportation facility now in use or hereafter designed for use for the transportation or carriage of per-

sons or property", and defines "railroad" as "includ[ing] railways, extensions thereof, tunnels, subways, bridges, elevated structures, tracks, poles, wires, conduits, power houses, substations, lines for the transmission of power, car barns, shops, yards, sidings, turnouts, switches, stations and approaches thereto, cars and motive equipment."

In 1922 the states, with the consent of Congress, adopted a Comprehensive Plan for the development of the Port of New York. *N. J. S. A.* 32:1–25 *et seq.; Pub. Res. No.* 66, 67th Cong., 2d Sess. The Comprehensive Plan sets forth the development program initially envisioned by the Commission for implementation by the Port Authority.

In the Plan, like the *Report* upon which it was based, unification of terminal operations and facilities, consolidation of shipments, adaptation and coordination of existing facilities, improvement of commercial rail, truck and water facilities and other freight handling improvements are set forth as principles to govern the development of the Port Authority. The Comprehensive Plan proposed to establish direct rail freight connections between New Jersey and Manhattan to furnish "the most expeditious, economical and practical transportation of freight especially meat, produce, milk and other commodities comprising the daily needs of the people." *N. J. S. A.* 32:1–29. Section 8 of the 1922 Comprehensive Plan statute denies to the Authority the power to levy taxes or assessments, and provides that the bonds or other securities issued by the Port Authority shall at all times be free from taxation by either state. *N. J. S. A.* 32:1–33. Finally, it should be noted that the power was reserved to the states to add to, modify or change any part of the Plan. *N. J. S. A.* 32:1–26.

Pursuant to the Compact, the Comprehensive Plan and subsequent amendments and supplements thereto, the Port Authority operates all of the interstate vehicular tunnels and bridges in the Port District, which include the Holland

Tunnel[8], the Lincoln Tunnel, the George Washington Bridge, the Bayonne Bridge and the Arthur Kill Bridges. In addition, the Port Authority owns and/or operates the following facilities: Newark International Airport, Teterboro Airport, LaGuardia Airport, John F. Kennedy International Airport and two heliports; Port Newark, the Hoboken Port Authority Marine Terminal, the Elizabeth Port Authority Marine Terminal, the Columbia Street Marine Terminal, the Erie Basin Port Authority Marine Terminal and a Mid-Manhattan Consolidated Passenger Ship Terminal; the Port Authority Bus Terminal, the George Washington Bridge Bus Station and the Newark and New York Union Motor Truck Terminals; the Port Authority Trans-Hudson system (operated for the Port Authority through its wholly-owned subsidiary, the Port Authority Trans-Hudson Corporation) and the World Trade Center.

Excluding the 1921 Compact and the 1922 Comprehensive Plan, the Legislatures of New Jersey and New York have adopted 39 separately enacted, concurrent statutes authorizing the construction and financing of the foregoing facilities, the issuance of bonds and notes by the Authority, the regulation of suits against it, and the establishment of a general reserve fund for the payment of the Authority's obligations. None of these 39 statutes received specific Congressional consent.

2. *The Financial Structure of the Port Authority*

Under the terms of the Compact the power to levy taxes or to pledge the credit of either state was expressly withheld from the Authority. From its inception, with the exception of monies advanced as loans by the states, the Authority was

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[8]The Holland Tunnel had been constructed by state commissions pursuant to a compact between the states which received the consent of Congress. In 1930 the Holland Tunnel was transferred to the Port Authority in order to enable it to honor its obligations to bondholders in the face of deficits incurred in connection with the Arthur Kill, George Washington and Bayonne Bridges. *L.* 1930, c. 247.

required to finance its facilities solely with money borrowed from the public and to be repaid out of the revenues derived from its operations. By reason of these financial limitations two concepts initially emerged which have played an important role in the realization of the purposes for which the Authority was created: first, the specific projects undertaken by the Authority should be self-supporting, *i. e.*, the revenues of each should be sufficient to cover its operating expenses and debt service requirements; and second, since the Authority is a public agency over which its creditors have no direct control, the bondholders should be protected by covenants with the Authority and with the states which have ultimate control over its operations.

The first facilities constructed by the Authority were vehicular spans linking Staten Island and New Jersey — the Arthur Kill Bridges — which were opened to traffic in 1928. A third Staten Island-New Jersey crossing, the Bayonne Bridge, was placed in operation in 1931. In that same year the George Washington Bridge was opened to traffic. With respect to each of these facilities the Port Authority was authorized to and did issue bonds in separate series to pay for the cost of acquisition of lands and construction. The revenues and tolls from each facility were statutorily pledged as security for the repayment of the series bonds issued in conjunction with the specific facility involved. *N. J. S. A.* 32:1–39, 62, 86. The States of New Jersey and New York advanced additional moneys to pay for the costs of construction, and the funds so advanced were accorded a subordinated status to the funds raised by the Authority from the sale of its own bonds to the public. *N. J. S. A.* 32:1–60, 63, 81, 87. The statutory authorizations for each project and its funding were declared to be "a contract or agreement between the two states for the benefit of those lending money to the port authority." *N. J. S. A.* 32:1–65, 89.

The first bonds issued to the public by the Authority were "closed-end" bonds based on the estimated costs of each facility, and the Authority was prohibited from issuing more

bonds than the amount initially authorized for the project. See *Goldberg, A History of the Port of New York Authority Financial Structure* (1964), at 3 (hereafter cited as *Goldberg*). The gross revenues from each bridge were applied first to the payment of expenses of operation and maintenance of the bridge, then to the payment of debt service on its bonds, and the surplus, if any, was to be deposited in a separate reserve fund available only to the bondholders of that series. *Goldberg,* at 4.

As noted earlier, the initial facilities were not self-sustaining, and in 1930 the states transferred the control, operation and the revenues of the Holland Tunnel to the Port Authority to help place the Port Authority on a self-sustaining basis. *N. J. S. A.* 32:1–119. Simultaneously, the states enacted legislation, commonly called the General Reserve Fund Act, *N. J. S. A.* 32:1–142, and by the terms of that act the surplus revenues derived by the Authority from all facilities built with the proceeds of sale of its bonds are pooled so as to create a general reserve fund in an amount equal to 10% of the par value of all bonds issued by the Authority. The act pledges the general reserve fund as security for the payment of interest and principal on all bonds theretofore or thereafter issued by the Authority. Surplus moneys of the Authority in excess of the general reserve fund requirements may be used for any purpose authorized by the states.

The general reserve fund thus becomes available to bondholders to pay the debt service requirements of facilities which were not self-supporting. By this device the surplus revenues of the Holland Tunnel were used to pay the debt service requirements of the Arthur Kill and Bayonne Bridges and the George Washington Bridge. The general reserve fund was also envisioned as a security device to induce the public to invest in future facilities such as the then contemplated Lincoln Tunnel project. See *Goldberg,* at 7.

Following the enactment of the General Reserve Fund Act the Port Authority issued additional series of bonds to finance the construction of the Inland Terminal Building and to repay

the states for the amounts expended by them to construct the Holland Tunnel. *Goldberg,* at 5. In 1935 the Authority commenced the issuance of a new series of bonds, known as general and refunding bonds, the proceeds of which were used to refund all of the original bridge bonds issued by the Authority and to finance the initial construction of the Lincoln Tunnel. These bonds were secured by a pledge of the net revenues of all of the Authority's then existing facilities and by the general reserve fund. Under the terms of the resolution authorizing the issuance of general and refunding bonds the Authority also contracted to create a special reserve fund into which would be paid all net revenues in excess of those required to pay the operating expenses of the Authority's facilities, the debt service requirements for the general and refunding bonds, and to maintain the general reserve fund at its prescribed level. *Goldberg,* at 11. The authorizing resolution imposed limitations on the use of the special reserve fund for the benefit of the bondholders.

In 1947 the Authority commenced the issuance of air terminal and marine terminal bonds, the proceeds of which were used for the acquisition and construction of various airport and marine terminal facilities. These bonds were secured by a pledge of the revenues of the specific facilities financed thereby, as well as by a call upon the general reserve fund to the extent that revenues from the facilities were insufficient to pay operating expenses and debt service requirements. As in the case of the general and refunding bonds, the air and marine terminal bond resolutions provided for their own special reserve funds for the benefit of the bondholders of each of these series.

In 1952 the Commissioners of the Port Authority embarked upon a new scheme for future financing which abandoned the practice of earmarking specific facility revenues as security for its bonds. On October 9, 1952 the Authority adopted the Consolidated Bond Resolution (the CBR), authorizing the issuance of consolidated bonds to serve as the medium for financing its activities in furtherance of any purpose for

which the Authority is authorized to issue bonds secured by a pledge of the general reserve fund.[9] Consolidated bonds constitute general obligations of the Authority, and all such bonds are equally and ratably secured by a pledge of the net revenues of all existing facilities and any additional facilities which may be financed in whole or in part by the issuance of consolidated bonds.[10]

With the adoption of the CBR the "self-supporting" facility concept which had governed earlier authority financing ceased to have the significance previously attached to it; for under the CBR the Authority's financial structure is based on a unitary enterprise concept and all revenues from all facilities are pooled. Individual facilities are not financed independently of the rest of the Authority. The facilities contribute their revenues for debt service on all Authority bonds according to their earning power and without regard to the amount of bonds issued for the construction of any particular facility.

While some facilities may not yield sufficient revenues to pay operating expenses and/or debt service requirements, what is of paramount concern to bondholders under the CBR is whether the total revenues of the Authority are sufficient to satisfy all of its obligations to bondholders. And in order to ensure that the abandonment of the "facility-by-facility" approach would not lead to a dilution of pledged revenues and reserves, the CBR contains covenants with the bondholders with respect to future operations and activities of the Authority and the issuance of bonds secured by a pledge of its revenues and reserves.

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[9]The Authority covenanted, by the CBR, that no additional general and refunding, air terminal or marine terminal bonds shall be issued.

[10]As noted *infra*, although general and refunding, air and marine terminal bonds are still outstanding, the Authority has fully funded its obligations to those bondholders and the consolidated bonds presently have a first call upon all revenues of the Authority.

One of the principal protections afforded bondholders by the CBR is the so-called "1.3 test" contained in section 3.[11] The 1.3 test prohibits the issuance of new consolidated bonds unless the best one-year net revenues of all of the Port Authority's facilities equal or are greater than 1.3 times the prospective debt service for the calendar year during which the debt service of all outstanding and proposed new bonds secured by a pledge of the general reserve fund would be at a maximum.[12] The 1.3 test is thus an equation in which one component consists of the Authority's net revenues from all facilities, and the other component is the maximum annual debt service required to be paid on all Authority bonds, including the new bonds to be issued. The maximum annual debt service component is readily calculable from the requirements set forth in the resolutions authorizing the bond issues.

[1] The annual net revenue component of the equation consists of the Authority's historical net revenues from existing facilities[13] plus the estimated average annual net revenues of the facility to be acquired or constructed with the issuance

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[11]While section 3 of the CBR provides alternate conditions for the issuance of consolidated bonds, in practice the 1.3 test described above is the least restrictive and has been the only one employed by the Port Authority since the adoption of the CBR. *Goldberg*, at 19.

[12]There is a dispute between the parties to this litigation whether a projected operating deficit of a facility to be acquired by the issuance of consolidated bonds must be deducted from net revenue for the purpose of determining whether the 1.3 test has been met. Under the terms of the CBR, if the facility to be acquired has been in operation for at least 36 months prior to the issuance of consolidated bonds, the annual operating deficit of the facility would be deducted from historical Authority net revenues in applying the 1.3 test. However, according to an Authority witness, if the facility to be acquired has not been in operation for at least 36 months, its projected operating deficit can be ignored. This view is contrary to the position of the Authority in statements made and testimony given to the Farley Committee. See *infra*, pages 152, 155–156.

[13]For this purpose the Authority is permitted to select any consecutive 12-month segment out of the 36-month period preceding the date of issuance of new consolidated bonds.

of new bonds.[14] While the 1.3 test speaks only of estimated net revenues and not of "deficits," it is evident from the purpose of the 1.3 test as well as Authority practice in arriving at historical net revenues that the estimated average annual *deficits* of a new facility must be charged against historical revenues in determining whether the 1.3 test has been met. The purpose of the 1.3 test is to protect existing bondholders against dilution of pledged revenues and reserves; if consolidated bonds are issued to acquire or construct a substantial deficit operation whose drain on Authority revenues is not included in the earning's component, the 1.3 test would be meaningless. Further, it is to be noted that in calculating historical net revenues of existing facilities the Authority arrives at one pooled figure which takes into account the deficits of such facilities.

Section 5 of the CBR directs the application of the pledged revenues to the payment of debt service upon all consolidated bonds, with the remaining balance to be paid into the consolidated bond reserve fund except to the extent necessary to be paid into the general reserve fund to maintain it at the level prescribed by statute.

Section 6 of the CBR provides that the payment of debt service upon all consolidated bonds "shall be further secured equally and ratably by the General Reserve Fund." Moneys in the general reserve fund may not be used for any purpose if there are other moneys of the Port Authority available for that purpose, unless there are sufficient funds available to the general reserve fund to pay debt service upon outstanding bonds during the ensuing 24 months, in which event such excess moneys could be used for any purpose permissible under the General Reserve Fund Act, whether or not other moneys were available for that purpose.

Section 7 of the CBR establishes a consolidated bond reserve fund into which all net revenues pledged as security

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[14]The estimated average annual net revenue is based on estimated revenues for the first 36 months of operation of the new facility.

for consolidated bonds (after payment of debt service on all consolidated bonds and of amounts necessary to bring the general reserve fund to its statutory level) are required to be paid. The moneys in the consolidated bond reserve fund may be used only for the payment of: (a) consolidated bonds at maturity, retirement or redemption; (b) debt service upon outstanding consolidated bonds; (c) the deficit of any facility the net revenues of which were pledged as security for consolidated bonds, and (d) "any other additional purposes for which the Authority is now or may hereafter be authorized by law to expend the revenues of its facilities." The pledge of the net revenues of the Authority and of the moneys in the Consolidated bond reserve fund is subject to the right of the Authority to apply the revenues and the reserve fund as provided in section 7, and the right to issue bonds, other than consolidated bonds, secured by the reserve fund if such other bonds "are issued solely to fulfill obligations to or for the benefit of the holders of consolidated bonds and if such other bonds are also secured by a pledge of the General Reserve Fund."

Since the adoption of the CBR, capital expenditures of the Authority have been financed by the issuance of 41 series of consolidated bonds and short term notes. New facilities and improvements to existing ones have been funded without regard to the individual project's ability to generate income. This has enabled the Port Authority to undertake projects which would not be financially feasible alone but are possible because of the surplus revenues generated by its other facilities.[15] New projects undertaken since 1952 include the acquisition and/or construction of two heliports, the Brooklyn, Erie Basin, Elizabeth and Hoboken Marine Terminals, the Port Authority Trans-Hudson (PATH) System, a bus terminal and the World Trade Center.

[15]For the calendar year 1973, of the 22 facilities operated by the Authority, 14 were operated at a deficit, *i. e.*, the gross revenues were not sufficient to cover operating expenses and debt service requirements.

With respect to each series of consolidated bonds issued, the Authority adopts an authorizing resolution. Section 7 of each series resolution prohibits the issuance of any additional consolidated bonds or any other bonds to be secured by a pledge of the general reserve fund with respect to any facility or group of facilities as to which the Authority has not previously issued bonds unless

> *** * * the Authority shall certify at the time of issuance its opinion that the issuance of such Consolidated Bonds or that such pledge of the General Reserve Fund as security for such bonds other than Consolidated Bonds will not, during the ensuing ten years or during the longest term of any of such bonds proposed to be issued (whether or not Consolidated Bonds), whichever shall be longer, in the light of its estimated expenditures in connection with such additional facility or such group of additional facilities, materially impair the sound credit standing of the Authority or the investment status of Consolidated Bonds or the ability of the Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds; and the Authority may apply monies in the General Reserve Fund for purposes in connection with those of its bonds and only those of its bonds which it has theretofore secured by a pledge of the General Reserve Fund in whole or in part.**

Each consolidated bond states that it "is issued pursuant to and in full conformity with the Compact between the States of New York and New Jersey creating the Authority, and the various statutes of said two States amendatory thereof and supplemental thereto, for purposes provided in said Compact and statutes". No specific statute is mentioned in the bonds.

On December 31, 1970 the Authority placed in trust with the First National City Bank, as trustee, $60,749,000 from the Authority's special reserve fund, air terminal reserve fund and marine terminal reserve fund to secure fully, unconditionally and absolutely the Authority's obligation to provide for the redemption as scheduled and the payment of interest until redemption on the Authority's outstanding

general and refunding bonds, air terminal bonds and marine terminal bonds. After the establishment and during the maintenance of these trusts no further payments are required to be made into such reserve funds. As a result the pledge of Authority revenues and reserves to secure repayment of consolidated bonds is no longer subject to the prior lien in favor of the earlier series of bonds. The maintenance of the reserve funds in trust permits the application of all net revenues and reserves of the Authority to the payment of the consolidated bonds.

As of December 31, 1974 the issued and outstanding consolidated bonds of the Authority totaled $1,668,584,000,[16] the general reserve fund contained $173,487,000 and the consolidated bond reserve fund $46,800,000. Gross and net operating revenues for 1974 were $410,412,000 and $156,118,000, respectively. After debt service and sinking fund requirements were met the Authority had available for transfer to its reserve funds $67,018,000, resulting in a net increase in its reserves of $18,293,000 for the year.[17]

The Legislative History of the 1962 Covenant.

So far as the record reveals, the history of New Jersey's involvement with mass transit begins with the enactment of *chapter* 104 of the *Laws of* 1922. The Legislature there established the North Jersey Transit Commission[18] to study

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[16]This total includes $200,000,000 of bonds issued as the 40th and 41st series following the prospective repeal legislation of 1973, which are not "affected bonds" and hence not covered by the terms of the 1962 covenant.

[17]As at December 31, 1974 the Authority owed to various banks on short term loans $255,000,000. During 1974 the banks were repaid $40,000,000, plus interest, from the consolidated bond reserve fund, which accounts for the difference between the amount available for transfer to the reserve fund and the actual increase in the reserve fund balance at the end of the year.

[18]The preamble to the North Jersey Transit Commission Act of 1922, see *infra*, notes that the Port Authority Comprehensive Plan

and report upon plans for providing a comprehensive scheme of rapid passenger transit[19] between northern New Jersey communities and New York City. In its 1925 and 1926 reports this Commission noted both the urgent need for and complexity of a rapid transit plan for the northern New Jersey area which would furnish direct access to the midtown New York City area.

In 1927 the New Jersey Legislature authorized and directed the Port Authority to make plans to provide for rapid passenger transit between the states and within the Port District. Similar legislation was adopted in New York but was vetoed by Governor Alfred E. Smith, who in his veto message noted his unwillingness to have the Port Authority diverted from its principal objective of solving the freight distribution problems within the District. Governor Smith's veto to all intents and purposes ended any legislative effort to involve the Port Authority in an active role in commuter transit for the next 30 years.[20]

The years between 1928 and 1958 were devoted to largely fruitless efforts by numerous groups, agencies and commissions to devise a solution for mass transit within the metropolitan New York-New Jersey area. No useful purpose would be served in cataloging their failures — which were not failures of purpose, effort or imagination, but the failure to find the source of funds required to implement any plan. In the meantime the financial position of existing com-

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"does not include the problem of passenger traffic in the territory covered by said port development plan." *L.* 1922, *c.* 104.

[19]For the purpose of this opinion the term "rapid passenger transit" has reference to transportation of passengers by railroad and will be used interchangeably with the terms "commuter transit" and "mass transit," although the latter terms conceivably could involve means of conveyance other than by railroad.

[20]In 1936 the states requested the Port Authority to report on interstate and suburban passenger transportation. *Jt. Res. No. Laws* of 1936. The Port Authority filed its report in 1937, which disclaimed its financial ability to undertake a solution to the transit problems of the District.

muter transit facilities continued to deteriorate. By 1955 the Hudson and Manhattan Railroad had filed a petition for reorganization under the federal bankruptcy laws,[21] and the private railroads were petitioning the Interstate Commerce Commission for permission to abandon ferry service across the Hudson and to discontinue various passenger services because of substantial operating deficits.[22]

In 1958 the Metropolitan Rapid Transit Commission[23] issued a report to the states of New Jersey and New York setting forth a proposal for the construction of a trans-Hudson loop commuter transit system at an estimated capital cost of almost $500,000,000. The report noted the need to coordinate and to achieve a balance between highway and rail transportation systems. The Commission pointed out:

> That balance does not exist today. The automobile drivers and the bus operators make use of roadways, tunnels, bridges and central area terminals which are tax free and are either publicly maintained or publicly developed out of user taxes and user fees. Private railroad companies must raise the capital (and pay the interest on it) to build their rights-of-way and provide the operating facilities, and must maintain them and pay taxes on them. Since 1930, billions of public dollars have been spent, and are still being spent, by federal, state and local governments in the development of highways, bridges and other facilities for vehicular traffic, but no public funds whatever have been spent during the same period in promoting or improving

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[21] As of this date the four private companies which operate commuter railroad services in New Jersey are all being reorganized under federal bankruptcy laws.

[22] By 1959 the four commuter railroads operating in northern New Jersey sustained a total passenger operating deficit of $58,300,000. The New York commuter railroads had an aggregate deficit from commuter operations estimated at between $10,000,000 and $15,000,000 for 1960. The Staten Island Ferry operated at a loss of about $6,000,000 for the year, and the New York City Transit System had an operating deficit of $20,000,000, exclusive of debt service charges of $87,000,000.

[23] The New Jersey Metropolitan Rapid Transit Commission was created pursuant to *L.* 1952, *c.* 194 and was consolidated with its New York counterpart by *L.* 1954, *c.* 44.

> mass transportation by rail between the New York and New Jersey portions of the Metropolitan Area.
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> The imbalance has resulted in a constant and relentless deterioration of suburban rail service. Ferries are being abandoned, train service is reduced, petitions are filed for abandonments, cars are getting older without being replaced. Repeated increases in fares in an effort to match rising costs and to establish earnings which can be used to improve the properties are resisted by public regulatory bodies. The result is more constriction of service by railroads, with consequent further congestion of highway facilities. One very grave consequence has been the creation of a stupendous cycle of traffic congestion in the streets, constantly calling for still further enormous expenditure of public funds for still further vehicular traffic.
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> Obviously, the people and the governments within this New York-New Jersey Metropolitan area are now face to face with this looming crisis, and can no longer avoid it by conveniently looking the other way.
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> Capital for the construction of the trans-Hudson loop must be raised by a public agency and bonds issued by it must have some measure of public guarantee to be saleable. Revenue bonds for transit purposes have a bad reputation in the bond market because of the financial history and condition of transit systems. While it would be desirable that the users of the loop would pay through fares the full capital and operating cost all experience conclusively demonstrates otherwise. On the other hand, the public interest requires that the fares be established at a level to foster maximum usage and utility of the system and provisions must be made for possible deficits. In addition, it must be recognized that capital for construction and equipment cannot be secured merely by evidence that revenues will equal costs.

A study which had been prepared for the Commission on the financial structure of the proposed commuter transit system had suggested that "financing would not be available from any of the existing public authorities since this action would in some cases impair the obligations of the authorities' covenants with bondholders and would seriously affect the ability of the authorities to discharge the responsibilities for which they were established." Nevertheless, during the 1958 session of the New Jersey Legislature a bill was introduced (Assembly Bill No. 16) which provided that the Port Authority take over and financially develop, improve and operate interstate passenger rail transportation between

New Jersey and New York. The Port Authority submitted a statement to the Legislature in response to this bill in which it said, among other things:

> This opposition is based on the conclusion of the Commissioners that: (1) It is legally, financially and contractually impossible for the Port Authority to assume the railroads' increasingly heavy deficits from commuter operations or the cost of developing a new and comprehensive rail rapid transit system; and (2) The assumption of rail transit deficits by the Port Authority, the self-supporting agency of the two States, would immediately cripple and very quickly destroy the program of the two States now under way for the continued development of their essential public port and harbor facilities, airports, and interstate arterial systems.
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> In addition to the General Reserve Fund, various special reserve funds have been created as a result of contractual commitments with bondholders in support of the various issues of Port Authority bonds. As in the case of the General Reserve Fund, the Authority may apply moneys in the Special Reserve Funds for purposes relating only to those of its bonds secured by a pledge of the General Reserve Fund, including purposes relating to facilities financed by such General Reserve Fund Bonds.
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> All Port Authority revenues not applied to operation and maintenance and debt service *must* be paid into one or another of these reserve funds. There are no excess revenues which are free of this contractual commitment to bondholders.[24] [Emphasis supplied]

In its statement to the 1958 Legislature the Authority suggested that even if it were possible to ignore legal restrictions on the use of Authority net revenues to finance commuter rail deficits, such a course of action would impair the Authority's credit standing and adversely affect the ability of the Authority to carry out its then existing programs. To reinforce this view the Authority solicited and included in its statement similar expressions of opinion from members of the investment banking community.

In January 1959 a joint report was issued on Assembly Bill No. 16 by the New Jersey Assembly Committees on

[24] In view of recent developments it should be noted that in its statement the Authority also opposed an increase in tolls for the Hudson River crossing since this would constitute an "unfair tax" upon motorists to subsidize rail transit.

Highways, Transportation and Public Utilities, and on Federal and Interstate Transportation. This report concluded that the Port Authority could not be called upon to undertake the entire rail passenger transit obligation because (1) no one could estimate the size of the deficit operation the Authority would be undertaking, and (2) while the Authority could absorb some deficit, its operations, taken as a whole, must be self-supporting.

Pressures for financial aid to and Port Authority involvement in commuter transit continued to mount, and in 1960 the New Jersey Senate created a committee (known as the Farley Committee) to study the financial structure and operations of the Authority. One of the principal subjects investigated by the Farley Committee was the Authority's role in commuter transit. At the time the Committee's hearings commenced its immediate concern was to find a means to continue the operations of the bankrupt Hudson & Manhattan Railroad (H & M). The bankruptcy reorganization proceedings involving the H & M had reached the point where, in 1959, the District Court had left the H & M with sufficient cash for operations to continue for only two years. See *In re Hudson & Manhattan Railroad Co.*, 174 *F. Supp.* 148 (S. D. N. Y. 1959), aff'd *sub nom. Spitzer v. Stichman*, 278 *F.* 2d 402 (2 Cir. 1960). The Authority's Executive Director, Austin Tobin, testified before the committee concerning his discussions with New Jersey Highway Commissioner Dwight Palmer to have the Port Authority acquire and operate the H & M. Tobin testified in September 1960:

> Faced with these legal and contractual commitments [to the Authority's bondholders], which are the whole basis of the Authority's credit, Commissioner Palmer and the Port Authority have been examining, beginning with our initial exploration of the possibility on last February 15, whether bi-state legislation could be fashioned under which the Authority might even acquire and finance the bankrupt and deficit-ridden Hudson & Manhattan properties and finance its modernization by the Port Authority as a new Port Authority facility.

In other words, could any legal and financial plan be worked out that would meet the foregoing contracts with investors and, from the standpoint of maintaining the Port Authority's credit, guarantee that the Authority would not thereupon become generally or further involved in the deficits of the commuter railroads, both in New York and in New Jersey? Obviously, unless such a covenant could be established no Port Authority bonds could be sold either for the acquisition of the Hudson & Manhattan properties or for any other Port Authority purpose.

Thus the core of the problem is whether or not the two States could, to use a phrase about it, 'build a statutory fence around' the Hudson & Manhattan by guaranteeing to investors that the Authority would not and could not become involved in the large and increasing deficits of the New York and New Jersey commuter railroads, which with the New York subways total a deficit of something like $150,000,000 a year.

In January 1961 Commissioner Palmer appeared before the Farley Committee and expressed his conclusion that the Port Authority should purchase and operate the H & M provided limitations were placed upon the Authority's role in mass transit. On this subject he testified:

The Port Authority in my opinion must make money and accumulate reserves for the rainy day if it is to be equipped to meet the needs of our two states of New York and New Jersey. It does not have general taxing powers. Its only taxes are the tolls it collects from the users of its facilities. Its shareholders are the public, you and I, and the institutions that buy the bonds. Since the cost of financing often determines the feasibility of a project it stands to reason that you and I get more for our toll dollar in the way of modern and safe facilities if we make certain that the credit rating of the Authority remains intact.

Now most of us realize that the matter of credit is not an exact science. The credit of an organization depends on quite a few factors; past performance, efficient management and calibre of personnel and markets for the product the institution has to sell; and last but not least — what investors think of the operation as a financial risk. It is, in the final analysis, the practical assessment of being repaid money that they lend to it.

Relating specifically to what ultimately became the 1962 covenant, Senator Wayne Dumont questioned Commissioner Palmer as follows:

Q. Commissioner, when the Port Authority made its proposal in September, at our hearings then, to take over the Hudson & Manhattan Tube, they surrounded their proposal with certain restrictions which, so far as I could tell were designed to eliminate any real obligation on the part of the Port Authority beyond taking over the Hudson & Manhattan Tubes, at least so far as the railroad field was concerned. Do you consider those restrictions that they surrounded this proposal with as reasonable ones? A. Yes, I do. And I have so stated in my proposal and I do it purely on the basis of what experience I may have had in the field of finance and industry, and of what we are hoping to obtain and acquire in the future in the expansion of facilities that the Port can supply.

* * * * * * * *

And it seems impossible, from all of my direct — and not through any other channels — direct contacts, to observe that money could be loaned for even the acquisition of the H&M in the event there was not some assurance that this just wasn't one bite of the cherry and that further transportation business was all to be pulled together. I think it's simply a question of whether the investor says yes or no, and at the present time my observation is the investor says no unless he has that limitation.

The following day the Port Authority's Vice-Chairman, James C. Kellogg, III, testified concerning the Authority's H & M plans. He emphasized that only by adopting what became the 1962 covenant could the Port Authority acquire and rehabilitate the H & M.

There is, of course, no possibility whatsoever that either the Port Authority or any one else could operate the H&M on a self-supporting basis. The bankrupt H&M has not paid a dividend since 1932; it has not been able to meet the interest on its bonded indebtedness and has been in receivership since 1954.

* * * * * * * *

On this estimate of the H&M losses [$3 million annually], and if we are able to satisfy prospective investors by statutory assurances that this proposal will not involve the Authority's General Reserve Fund in any other or further commuter deficit operations, we believe we can conscientiously certify, as we must under our indentures, that this financing will not impair the Port Authority's credit. On the other hand, if we are not in a position to cite such statutory assurances to those from whom we will have to borrow the money, and therefore, we are not in a position to make such a certification, we obviously would not be in a position to borrow money for the acquisition, let alone the improvement, of the H&M.

* * * * * * * *

All Port Authority revenues not applied to operation and maintenance and debt service *must* be paid into one or another of these

reserve funds. There are no excess revenues which are free from this contractual commitment to bondholders.

The most important pledges that the Port Authority has made to its bondholders are those relating to the issuance of bonds for new projects. These pledges were necessary since otherwise the security could be diluted, not only through the raiding of revenues and reserves, but just as disastrously by the unlimited issuance of bonds which have such revenues and reserves as their primary source of repayment.

It is because of this that the Port Authority had to covenant with its bondholders not to issue Consolidated Bonds supported by the General Reserve Fund for any new facility unless it can be demonstrated that, *including the new facility*, net revenues will be sufficient to cover by at least 1.3 times the maximum interest and principal payments due in any future year. Furthermore, bonds for a new facility cannot be issued with a pledge of the General Reserve Fund unless the Port Authority Commissioners certify that the issuance of the new bonds will not materially impair the sound credit standing of the Authority, the investment status of the Authority's bonds, or the ability of the Authority to fulfill its commitments and undertakings. Such protections for investors under open-end revenue bond issues are not uncommon.

Applied to the H&M proposal, I would like to make it clear that the question of whether or not we can borrow the $83,500,000 which is required, is not simply a question of whether or not we would have to pay a higher rate of interest on these funds. We can only submit to you the unanimous view of the Commissioners of the Port Authority that there is no possibility whatsoever of borrowing the money at all without a statutory assurance to investors that any future Port Authority responsibilities in the field of commuter rail transport over and above the present and existing interstate Hudson and Manhattan railroad system will not involve a pledge of the Port Authority's General Reserve Fund.

I say to you as a New Jersey Commissioner, and with all the sincerity that I can command, that there is nothing arbitrary or doctrinaire about this conclusion. It simply represents the Port Authority's credit. My business is investment financing and I say to you gentlemen that I could not sell a single Port Authority bond without such an assurance. If my responsibility were on the other side of the table, I would not buy a Port Authority bond that did not contain such an assurance. [Emphasis supplied]

Following Kellogg's prepared statement he was questioned by Senators Farley and Cowgill as to the binding effect

which the proposed covenant legislation could have on a subsequent legislature. The questioning proceeded as follows:

BY SENATOR FARLEY:

Q. Mr. Kellogg, I noticed in the latter part of your statement, you said you must be given assurance by the Legislature that if they directed the Port to proceed to purchase this property, they must make a pledge to the bondholders there be no further projects involving rail. Now I appreciate that if the Legislature directs you to enter into a contract involving the issuance of bonds, there will be no impairment of obligations of contract, but I must call to your attention and the members of your Commission that one Legislature cannot bind a subsequent Legislature involving policy. If, perchance, may I illustrate — ten, fifteen, twenty years from now the respective legislatures of New York and New Jersey importune your Port Authority Commission to do something in addition involving public service, one legislature cannot bind another involving policy. Do you follow me? A. I do.

Q. I appreciate the legal end of it involving obligation of contract, but in your statement that you be given assurance that no further services should be required of you involving rail forever hereafter — and how this legislature could bind a subsequent legislature I do not know. A. We'd have to say that to the bondholders, the ones that were going to purchase the new bonds, that we as Commissioners believe that this would not endanger the 1.3 ratio.

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BY SENATOR COWGILL:

Q. I want to clear one thing up. I got a little confused there for a minute on that policy business — in the event that the H&M were acquired on the basis of statutes passed by New Jersey and New York, they would not be called upon, that is, the Port Authority would not be called upon, to go into any further commuter problems of other roads. If bonds were issued under such legislation, you would not be able to issue any further bonds for anything else unless you were willing to certify that it would not — A. That's correct. It wouldn't say that the bonds couldn't be issued with a state guarantee later on for something else or something of that type, freight or anything else.

Q. It seems to me on that basis, that you enter a contract on the basis of legislation passed, that contract is going to stand and some later legislature is not going to be able to change it. A. That's right.

SENATOR FARLEY:

My question, Senator, was — and I appreciate we cannot impair obligations: In effect, would any commitment with the present legis-

lature estop or attempt to estop any legislation involving public needs in the future? [No answer was given at this point].

Commissioner Clancy of the Port Authority followed Commissioner Kellogg to the stand and the following colloquy took place directed to the same point:

SENATOR FARLEY:

I say to you as a commissioner representing New Jersey we too have a responsibility of making sure that this is done thoroughly, intelligently and in a way that would be feasible and practical. It was testified today by Mr. Kellogg that the Port should not be bound by any other demand from the State Legislature relative to rail service. I pointed out to him — and may I say to you as a lawyer — we well appreciate that any direction we give you by enacting legislation, we could not impair any obligation such as contracts of bond issues. Likewise, you as a lawyer know that one legislature cannot bind the other involving policy five, ten, or twenty years hence. A. I appreciate that.

Q. So that when this Committee makes its report, we are not exonerating the Port from any responsibility for any demand for future public service by either the New York or New Jersey legislature. I want you to appreciate that fact. A. I appreciate that fully and I am aware of the fact if a situation such as that would arise in the future, that would be a matter that we would have to discuss on its own merits with a future Governor and future legislature.

Q. That's right.

* * * * * * * *

MR. TOBIN:

May I say something?

SENATOR FARLEY:

I want to call you, Mr. Tobin, relative to this situation. If you want to interject something at this time, we will be very happy to have you do so.

MR. TOBIN:

You might want to know that this legislative assurance, as Commissioner Kellogg pointed out, would only apply to future commuter

operations and only limits the use of the pledge of the general reserve fund. It only limits the pledge of the general reserve fund, nothing else. It would not typically bar Port Authority participation where some other scheme of guarantee of the bonds or something like that —

SENATOR FARLEY:

That would have to depend on its own merit or demerit and then be considered. But I call to your attention as a Commissioner the problem of the Legislature.

I am aware of the problem, but, of course, the action that is taken now with reference to the Hudson and Manhattan would not necessarily of itself bar future participation in the problem generally. It would, however, not be possible if that future participation involved any impairment of this reserve fund.

While the Farley Committee hearings were in progress the New York Legislature adopted legislation directing the Port Authority to acquire and operate the H&M, *Laws of N. Y.* 1961, *c.* 312, without any covenant against or limitation upon future Authority involvement in passenger rail transit. This legislation was not acceptable to the New Jersey Legislature because "the absence of such a covenant * * * endangered the future utility of the Port Authority to the two States." *Report of Senate Investigation Committee Under Senate Resolution Number 7 of the Year 1961,* at 23. The Committee's report, which was issued in 1963, notes that it sponsored the 1962 covenant legislation so as to limit

> * * * by a constitutionally-protected statutory covenant with Port Authority bondholders the extent to which the Port Authority revenues and reserves pledged to such bondholders can in the future be applied to the deficits of possible future Port Authority passenger railroad facilities beyond the original Hudson & Manhattan Railroad system. [*Id.* at 24]

The 1962 covenant legislation was passed unanimously by both houses of the New Jersey Legislature on February 13, 1962 and Governor Hughes signed the bill on the same day. The New York Legislature followed suit on March 7, 1962, *Laws of N. Y.* 1962, *c.* 209, and the covenant legislation be-

came effective upon Governor Rockefeller's signature on March 27, 1962.

L. 1962, *c.* 8, authorized the Port Authority to proceed with the acquisition, construction and operation of a port development project which would include the World Trade Center and the H&M. *N. J. S. A.* 32:1–35.52. For this purpose the Authority was authorized to issue bonds for the project secured by a pledge of the general reserve fund. *N. J. S. A.* 32:1–35.53. The preamble of the act reflects the following legislative findings relevant to the H&M acquisition:

> The States of New York and New Jersey hereby find and determine:
> (1) that the transportation of persons to, from and within the Port of New York and the flow of foreign and domestic cargoes to, from and through the Port of New York are vital and essential to the preservation of the economic well-being of the northern New Jersey-New York metropolitan area;
> (2) that in order to preserve the northern New Jersey-New York metropolitan area from economic deterioration, adequate facilities for the transportation of persons must be provided, preserved and maintained and that rail services are and will remain of extreme importance to such transportation of persons;
> (3) that the interurban electric railway now or heretofore operated by the Hudson & Manhattan Railroad Company is an essential railroad facility serving the northern New Jersey-New York metropolitan area, that its physical plant is in a severely deteriorated condition, and that it is in extreme financial condition;
> (4) that the immediate need for the maintenance and development of adequate railroad facilities for the transportation of persons between northern New Jersey and New York would be met by the acquisition, rehabilitation and operation of the said Hudson & Manhattan interurban electric railway by a public agency, and improvement and extensions of the rail transit lines of said railway to permit transfer of its passengers to and from other transportation facilities and in the provision of transfer facilities at the points of such transfers;
> • • • • • • • •
> (8) that the Port of New York Authority (hereinafter called the port authority), which was created by agreement of the 2 States as their joint agent for the development of the transportation and terminal facilities and other facilities of commerce of the port district and for the promotion and protection of the commerce of their port, is the proper agency to act in their behalf (either directly or by or through wholly-owned subsidiary corporations) to effectuate, as a unified project, the said interurban electric railway and its extensions and the [World Trade Center] • • • [*N. J. S. A.* 32:1–35.50]

The operative provisions of the covenant are contained in the first paragraph of § 6 of *chapter* 8, *N. J. S. A.* 32:1–35.55, and they are as follows:

> The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any of such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, (a) the 2 States will not diminish or impair the power of the port authority (or any subsidiary corporation incorporated for any of the purposes of this act) to establish, levy and collect rentals, tolls, fares, fees or other charges in connection with any facility constituting a portion of the port development project or any other facility owned or operated by the port authority of which the revenues have been or shall be pledged in whole or in part as security for such bonds (directly or indirectly, or through the medium of the general reserve fund or otherwise), or to determine the quantity, quality, frequency or nature of the service provided in connection with each such facility; and (b) neither the States nor the port authority nor any subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth.

"Affected bonds" are defined as including all bonds secured in whole or in part by the general reserve fund or any other reserve fund established by contract between the Authority and the holders of its bonds. Since all consolidated bonds are secured by a pledge of the general reserve fund, as well as the consolidated bond reserve fund, all outstanding consolidated bonds, with the exception of those of the 40th and 41st series,[25] are affected bonds under the terms of the covenant.

"Permitted purposes" as defined in the statute include: (1) the H&M as it existed on the effective date of the legislation;

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[25] See *infra* at 179–180.

(2) any railroad freight facilities owned by the Authority; (3) railroad tracks on vehicular bridges owned by the Autority; and (4) passenger railroad facilities (other than the H&M) only if one of two conditions is met: (i) the Authority certifies that such other railroad facility is self-supporting, or (ii) if the general reserve fund contains the required statutory amount (10% of all outstanding Authority bonds) and the Authority certifies that the deficit of such other facility, together with the deficits of all other passenger railroad facilities owned by the Authority, will not exceed "permitted deficits" as thereafter defined.

A passenger railroad facility may be certified as "self-supporting" if its estimated average annual net operating income for the first ten years of operations is at least equal to the estimated average annual debt service on bonds issued in connection with the facility.

A passenger railroad "deficit" is defined as the average estimated annual debt service upon the bonds issued for passenger railroad purposes over the first ten-year period of operations less the average estimated annual net operating income of the railroad facility, or plus the average estimated annual net loss of the railroad facility. To illustrate: If the average annual debt service requirement is $10,000,000 and the average annual net operating income is $5,000,000, the statutory deficit is $5,000,000. If it is estimated that an average annual net loss of $5,000,000 will be incurred from operations, the statutory deficit would be $15,000,000.

A "permitted deficit" is a deficit which does not exceed (A) the amount of the passenger railroad deficit the payment of which one or both states is willing to guarantee for the period for which the Authority would be liable for such deficit, plus (B) the greater of (1) an amount equal to 10% of the general reserve fund at the end of the preceding calendar year less an amount equal to 1% of the Authority's bonds outstanding at the end of the preceding calendar year which were issued for passenger rail purposes (including the H&M), or (2) an amount equal to 10% of the amount

calculated under clause (1) plus 1% of the Authority's equity in all facilities other than passenger rail facilities.

Thus, assuming the States of New York and New Jersey enter into an agreement with the Authority to pay the deficit of a proposed passenger railroad facility, the deficit of such facility is a permitted deficit under the 1962 covenant and the Authority is authorized to issue its bonds for such purpose. In the absence of a guarantee by the states to pay any part of the deficit, the maximum permitted deficit must be calculated under (B) as reflected in the following illustration: Assuming the general reserve fund contains $175,000,000 and the Authority has outstanding bonds issued for the H&M and other passenger railroad purposes in the amount of $150,000,000, clause (1) permits the Authority to issue bonds secured by the general reserve fund if the estimated average annual deficits of all its passenger rail facilities, including the proposed facility, do not exceed $16,000,000 ($17,500,000 – $1,500,000). Assuming the same facts and an Authority equity in nonrailroad facilities of $1,200,000,000, under clause (2) the permitted deficit would be $13,600,000 ($1,600,000 + $12,000,000). Hence, on the assumed facts, since the amount calculated under clause (1) is greater, the permitted deficit would be $16,000,000[26].

On September 1, 1962, following enactment of the 1962 covenant legislation referred to above, the Port Authority, through a wholly-owned subsidiary (Port Authority Trans-Hudson Corporation or PATH), assumed ownership and operating responsibilities over the H&M. The Commissioners' 1962 certification with respect to the acquisition of the PATH System was made on the basis of an opinion of A. Gerdes Kuhbach, the Director of Finance of the Port Authority,

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[26]Since the annual deficits of the H&M (operated by the Authority under the acronym PATH) are substantially in excess of the permitted deficits calculated under 1963 covenant formula, the covenant prohibits the Authority from issuing any bonds for passenger rail purposes which would be secured by a pledge of the reserve funds of the Authority. See *infra* at 165.

which was prepared at the request of the Commissioners. His opinion analyzed and reviewed the financial aspects and data relating to the proposed acquisition, rehabilitation and operation of the PATH system. He concluded that the section 7 certification required under the series consolidated bond resolutions could be made, since the anticipated net loss after debt service for the years 1969 through 1991 would level off at approximately $6,595,000[27] per year, an amount that would not impair the sound credit rating of the Port Authority. More specifically, Kubach concluded that

> a) There is always a comfortable margin between the anticipated net loss and 10% of the estimated General Reserve Fund;
>
> b) Net revenues available for Reserves will not be materially diluted by undertaking the acquisition, rehabilitation and operation of the Hudson Tubes;
>
> c) The coverage of both annual obligatory long term debt service and future maximum debt service is sufficiently within the limits necessary to preserve the Port Authority's credit and to continue the issuance of Consolidated Bonds.
>
> I therefore conclude that the application of all or any portion of unexpended proceeds of Consolidated Bonds, Nineteenth Series, Due 1991, will not during the years 1962 through 1991, in light of the estimated expenditures in connection with the Hudson Tubes, materially impair the sound credit standing of the Authority or the investment status of the Consolidated Bonds or the ability of the Port Authority to fulfill its commitments, whether statutory or contractual or reasonably incidental thereto, including its undertakings to the holders of Consolidated Bonds.

Since the enactment of the 1962 covenant the Port Authority has referred to the covenant in all official statements furnished to the public in connection with each series of consolidated bonds issued by the Authority. The reference is set forth under the heading "Statutory Covenant With Prior Affected Bondholders Against Dilution of Pledged Revenues and Reserves by Additional Passenger Railroad Deficits," and the terms of the covenant are then summarized. The first two sentences of text read as follows:

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[27] In 1962 the general reserve fund was approximately $69 million.

> In connection with the legislation which authorized the Port Authority to assume responsibility for the Hudson Tubes system the Port Authority had advised the Legislatures of both States that the credit of the Port Authority would be impaired by such an undertaking of an anticipated perpetual deficit facility unless the States would enter into an enforceable contract with the Port Authority bondholders which would grant assurances against dilution of already pledged revenues and reserves by any additional passenger rail deficits beyond those of the basic Hudson Tubes System. The legislation as finally adopted includes such statutory covenants.

As of December 31, 1973 the Authority had invested $185,800,000 of its funds in the acquisition and improvement of PATH. The accumulated operating deficits of PATH (determined in accordance with ICC accounting practices) total $125,000,000,[28] of which approximately $17,000,000 constitutes depreciation. PATH has incurred an annual deficit after debt service for each of the last five years in excess of 10% of the general reserve fund. Accordingly, under the 1962 covenant the Port Authority would be precluded from pledging any of its revenues or reserves to any other deficit passenger railroad operation. In 1973, using the Authority's accounting procedures, the PATH deficit for the year, including debt service, was $24,913,000.

Following the enactment of the 1962 covenant legislation an action was instituted in the New York state courts challenging the validity of the statute by New York property owners. The principal issues presented in the action dealt with the legislative authorization to the Authority to construct the World Trade Center. The plaintiffs urged, among other things, that the legislation was unconstitutional because no congressional consent had been obtained. The New York Court of Appeals upheld the constitutionality of the covenant legislation, and the appeal therefrom was dismissed by the United States Supreme Court for want of a substantial fed-

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[28] Using the Authority's method of accounting, the accumulated PATH deficit as of December 31, 1973 was $153,073,000, inclusive of debt service.

eral question. *Courtesy Sandwich Shop v. Port of N. Y. Auth.*, 12 *N. Y.* 2d 379, 240 *N. Y. S.* 2d 1, 190 N. E. 2d 402, app. dism. 375 *U. S.* 78, 84 S. Ct. 194, 11 L. Ed. 2d 141, *reh. den.* 375 *U. S.* 960, 84 S. Ct. 440, 11 L. Ed. 2d 318 (1963). The Court of Appeals disposed of the consent argument in the following manner:

> This argument must fail because, assuming consent to be required for this sort of concurrent action, the congressional consent originally given in 1921 and 1922 to the bi-State compact creating the Port Authority expressly contemplated such further co-operative legislation in furtherance of port purposes as was here accomplished. * * * Among the Articles of Agreement consented to were articles III, VII and VI, which created the Port Authority with the powers enumerated plus "such other and additional powers as shall be conferred upon it by the legislature of either State concurred in by the legislature of the other." Similarly, article XI, following the agreement for an initial comprehensive plan in article X, provides that the Port Authority should "from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two States, they shall be binding upon both States with the same force and effect as if incorporated in this agreement." Chapter 209 clearly falls within the congressional consent given to the articles contemplating the grant to the Port Authority of additional powers within the framework of the compact. [12 *N. Y.* 2d at 391, 240 *N. Y. S.* 2d at 7, 190 N. E. 2d at 406]

The lack of congressional consent to the covenant legislation was also raised by Port Authority bondholders in *Port Authority Bondholders Pro. Com. v. Port of N. Y. Auth.*, 387 *F.* 2d 259 (2 Cir. 1967). The Court of Appeals affirmed the dismissal of the bondholders complaint, having concluded that the United States Supreme Court's disposition in *Courtesy Sandwich Shop* had labeled the question "as unsubstantial." 387 *F.* 2d at 262.

In 1971 Theodore Kheel, Esq., and others instituted a class action in the United States District Court for the Southern District of New York challenging the constitutionality of the 1962 covenant on the grounds that it restricted the Authority's power to devote its revenues to nonself-supporting passenger rail facilities, in violation of the Compact and

Commerce Clauses of the United States Constitution, and impaired legislative sovereignty. The District Court dismissed the complaint, relying in part upon the disposition made in *Courtesy Sandwich Shop. Kheel v. Port of N. Y. Auth.*, 331 *F. Supp.* 118 (S. D. N. Y. 1971), aff'd on other grounds, 457 *F.* 2d 46 (2 Cir. 1972), *cert. den.* 409 *U. S.* 983, 93 S. Ct. 324, 34 L. Ed. 2d 248 (1973).

Legislative History of the Repeal of the 1962 Covenant.

Despite the enactment of the 1962 covenant, during the latter part of the 1960's and continuing to date there has been increasing public and governmental demand for the Port Authority to make a greater contribution toward a solution of the mass transit problems within the Port District. The critics of the Port Authority, as well as responsible executive and legislative officials, have focused primarily upon the utilization of the surplus earning capacity of the Authority's existing facilities to finance further Authority acquisition of or direct subsidies to mass transit facilities. It may be noted that between 1961 and 1970 the net revenues of the Authority had increased from $68,000,000 to $115,000,000, and over that period the Authority had available to it $454,000,000 in funds in excess of its debt service requirements.

In July 1964 Congress enacted the Urban Mass Transportation Act of 1964 (49 *U. S. C. A.* §§ 1601 *et seq.*), expressing for the first time a federal legislative interest in the support of urban mass transportation systems. In enacting the 1964 act Congress found (49 *U. S. C. A.* § 1601(a)):

> (1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;
>
> (2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate

provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) the Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

The purposes of the 1964 act were declared to be (49 *U. S. C. A.* § 1601(b)):

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economic and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

The scope of the 1964 act was expanded by the Urban Mass Transportation Assistance Act of 1970 on the basis of a finding by Congress (49 *U. S. C. A.* § 1601a) that "the rapid urbanization and the continued dispersal of population and activities within urban areas has made the ability of all citizens to move quickly and at reasonable cost an urgent national problem."[29]

In April 1970 Governors Cahill and Rockefeller announced a joint program to increase the Port Authority's role in mass transportation by building a rail link to John F. Kennedy International Airport and extending PATH to Newark International Airport and other parts of New Jer-

[29]In November 1974, after the repeal of the 1962 covenant, Congress enacted the National Mass Transportation Assistance Act of 1974, which provided $11.8 billion over the next six years for mass transit capital expenditures and, for the first time, operating subsidies on a matching basis.

sey. Bills were introduced in the New Jersey and New York Legislatures authorizing the Port Authority to undertake mass transportation projects providing access to John F. Kennedy and Newark International Airports. In March 1971 joint hearings were held in New York and New Jersey by the New York State Assembly Committee on Corporations, Authorities and Commissions and by the Autonomous Authorities Study Commission of the New Jersey State Legislature with respect to the relationship of the Port Authority to mass transportation and the proposed passenger rail links to the airports. In June 1971 the Legislatures of New York and New Jersey enacted legislation authorizing the Port Authority to extend passenger rail transportation to Kennedy International Airport and to Newark International Airport and Cranford. *L.* 1971, *c.* 245; *N. J. S. A.* 32:1–35.20 *et seq.* The sponsors of this legislation sought to avoid the limitations of the 1962 covenant by characterizing the proposed new railroad facilities "as constituting a part of each air terminal" rather than independent passenger railroads. *L.* 1971, *c.* 245, § 1. While this legislation was pending, the Port Authority obtained opinion letters from two New York law firms which concluded that the proposed rail extensions were subject to the provisions of the 1962 covenant and could not be financed out of Port Authority revenues or reserves unless "self-supporting" since PATH had used up all of the "permitted deficits" allowed by the covenant.

Following the enactment of the 1971 legislation the Commissioner of the New Jersey Department of Transportation commissioned a consulting firm to report on the Authority's ability to finance and operate the New Jersey PATH extension under the terms of existing covenants with bondholders, and to propose alternative financing programs if the Authority could not. The consultant's report was submitted in December 1971. At the outset it was noted that on the assumption the proposed additional facilities would operate

at a deficit, the 1962 covenant prohibited Authority financing and operation since the PATH deficit already exceeded the "permitted deficits" allowed by the covenant. The conclusion of the report was that the Port Authority was not, under the 1962 covenant, in a "favorable position" to provide the additional financing necessary for the proposed extensions of existing passenger rail facilities. The consultants recommended as an alternative solution the removal of PATH from the Authority's control so that the latter would no longer be responsible for its deficits.

In June 1972 the Port Authority and New Jersey Department of Transportation concluded on the basis of an engineering cost study that the proposed extension of PATH via Newark Airport to Cranford was not economically feasible under the terms of the 1962 covenant.

In the same month the State of New York passed a bill repealing the 1962 covenant. *Laws of* N. Y. 1972, *c.* 1003. Governor Rockefeller's message on the signing of that legislation stated:

> I am approving this bill in order to give incentive to the Port of New York Authority to proceed with urgently needed mass transportation facilities in the metropolitan region.
>
> Passed with overwhelming bipartisan support in both houses of the Legislature, the bill removes the absolute statutory prohibition against the use of the revenues of the Port of New York Authority for railroad purposes. That statutory covenant, together with the provision of the bi-state compact creating the Authority that neither State will construct competing facilities within the Port District, could forever preclude the two states from undertaking vitally needed mass transportation projects. In removing the present restriction, the bill would not jeopardize the security of Port Authority bondholders or their rights to maintain that security.
>
> * * * * * * * *
>
> New York, by the enactment of this measure, is taking an essential step in its long-range effort to realize the full potential of the Port Authority in meeting the total transportation needs of the New York-New Jersey port district. The Port Authority's active participation in helping to solve the problems of mass transportation in the New York City metropolitan area will inure to the benefit not only of millions of area residents generally, but also to the port facilities operated by the Authority and the workers and businesses that rely on them. This bill is consistent with the original purpose of the Port Authority — to ensure the coordinated development of terminal, transportation and other facilities of commerce in and about the port district for the greater benefit of the people of New York and New Jersey.

The repeal of the 1962 covenant adopted by New York proved to be unacceptable at that time to the New Jersey Legislature and Governor Cahill, and on November 15, 1972, following a series of meetings among Governors Cahill and Rockefeller and the Commissioners of the Port Authority, the Governors announced agreement on a bi-state plan of passenger rail transportation development by the Port Authority. The plan provided for the extension of PATH via Newark Airport to Plainfield, direct rail service from Kennedy Airport to New York City, and direct rail service to Penn Station, New York, for riders of the Erie Lackawanna Railroad in six northern New Jersey counties and two counties in New York. The estimated total cost of the plan was $650,000,000 and it was estimated that the Port Authority would invest between $250,000,000 and $300,000,000, with the balance of the funds being furnished by grants from the Federal Urban Mass Transportation Administration and the states. The Governors also proposed to repeal the 1962 covenant with respect to bonds issued subsequent to the enactment of the legislation proposed by the Governors.

On December 11, 1972 the New Jersey Senate held an information session to consider pending Port Authority mass transit bills. During this session representatives of the Port Authority and of Governor Cahill's office stated that the State of New Jersey would have to commit substantially all of the funds then available to the State of New Jersey from the Federal Urban Mass Transportation Administration.

The legislation embodying the 1962 covenant was amended by the State of New Jersey on December 28, 1972, *L.* 1972, *c.* 208, so as to repeal the 1962 covenant with respect to

Authority bonds issued after the effective date of the legislation. The New York Legislature enacted concurrent legislation which became effective on May 10, 1973. *Laws of N. Y.* 1973, *c.* 318.

On April 22, 1974 the New Jersey Legislature enacted *chapter* 25 of the *Laws of* 1974 (the "repeal act"). Governor Byrne signed the bill on April 30, 1974. Section 1 of this act repealed section 3 of *chapter* 208 of the *Laws of* 1972, the effect of which is to repeal, retroactively, the 1962 covenant as to all issued and outstanding "affected bonds" issued by the Port Authority. The introducer's statement annexed to the Assembly Bill No. 1304 (which became *chapter* 25), sums up the intent and purpose of the action taken:

This bill is designed to preclude the application of the 1962 covenant restricting port authority participation in mass transit projects. Chapter 208, P. L. 1972, precluded such application to bonds newly issued after the effective date of that act, but maintained in status quo the position of holders of bonds issued between March 27, 1962 and December 28, 1972. Since affected bonds are outstanding until the year 2007, the restrictions imposed by the covenant effectively preclude sufficient port authority participation in the development of a public transportation system in the port district. In 1972 the State of New York passed legislation precluding the application of the 1962 covenant from outstanding bonds as well as newly issued bonds. It is the purpose of this act to accomplish effective repeal of the covenant.

Concurring legislation was signed into law by Governor Wilson of New York on June 15, 1974. *Laws of N. Y.*, *c.* 993. Governor Wilson issued a statement when he signed the bill, in which he said in part:

In response to my inquiry, the Chairman of the Port Authority has also advised me that because of the heavy long term capital commitments for the PATH facilities and the Kennedy rail link, the Authority has no significant capacity to contribute funds for operating subsidies for commuter railroads. Hence, the plain and simple fact of the matter appears to be that the Authority has virtually no excess funds that could be channeled into operating subsidies for mass transportation facilities in the New York metropolitan area.

Even if such funds were available, existing bond indenture provisions which survive despite repeal of the statutory covenant would prohibit their use except in relation to facilities owned, leased or operated by the Port Authority.

The legislative history of the repeal of the covenant would not be complete without reference to other developments which were of immediate and continuing concern to the states and the nation at or about the time the repeal legislation was enacted. Commencing in the early 1950's and continuing to date the two states initiated studies of air pollution problems in their jurisdictions, and legislative action to control air pollution was undertaken by New Jersey as early as 1954, see *N. J. S. A.* 26:2C–1 *et seq.*, and by New York in 1957, see *Laws of N. Y.*, *c.* 931. In 1955 the United States Congress enacted the Clean Air Act, 42 *U. S. C. A.* § 1857 *et seq.*, the preamble of which sets forth the following findings (among others):

(a) The Congress finds —

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration and property, and hazards to air and ground transportation.

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments * * *

The studies which were undertaken identified automobile exhaust emissions as a significant contributing factor in air pollution, and as the primary source of air pollution in the City of New York. In 1962 the State of New York adopted legislation requiring the installation of positive crankcase devices on new cars. *Laws of N. Y.* 1962, *c.* 994. While similar legislation was not enacted in New Jersey, the State did institute on February 1, 1974 an auto emission

testing program as part of the mandatory motor vehicle inspection system.

The efforts of the states to alleviate health hazards associated with air pollution were given a major impetus by the congressional enactment in 1970 of amendments to the federal Clean Air Act. 42 *U. S. C. A.* § 1857(*c–l*) *et seq.*, pursuant to which the Administrator of the federal Environmental Protection Agency was authorized to establish national air quality standards and to prescribe, upon the failure of a state to do so, the steps necessary to achieve compliance with those standards.

On November 13, 1973, after the State of New Jersey failed to present an acceptable plan for achieving compliance with the national air quality standards for hydrocarbons and carbon monoxide, the federal Administrator promulgated regulations designed to achieve a major reduction in hydrocarbon and carbon monoxide pollution in the northern part of New Jersey. 38 *Fed. Reg.* 31388 *et seq.* The federally-mandated plan for New Jersey included the mandatory use of retrofit devices on gasoline-powered vehicles and "the application of certain transportation control measures including a requirement for a significant reduction in vehicle miles traveled." 38 *Fed. Reg.* 31389. The Administrator also emphasized the importance of the development of mass transit to the effort to improve New Jersey's air quality:

> The development of large-scale mass transit facilities and the expansion and modification of existing mass transit facilities is essential to any effort to reduce automotive pollution through reductions in vehicle use. The planning, acquisition, and operation of a mass transit system is, and should remain, a regional or State responsibility. Many improvements are being planned in mass transit facilities in the State that will make it possible for more people to use mass transit instead of automobiles. * * * [38 *Fed. Reg.* 31389]

Finally, reference must be made to the energy crisis, the dimensions of which became a matter of national concern in the fall of 1973 with the imposition of an oil embargo by

Arabian suppliers of crude oil and the rapid escalation of the price of oil. On February 4, 1974, two months before the repeal legislation was enacted, the New Jersey Legislature passed the Emergency Energy Fair Practices Act of 1974 (*L.* 1974, *cc.* 2, 6).

Section 2 of that act stated:

> **The Legislature finds and determines that because of world conditions and the manner in which energy sources and fuels are allocated and distributed that an energy shortage now exists and may continue for the foreseeable future.**

Section 3 of the act authorized the Governor "to proclaim by Executive Order the existence of an energy emergency" and to establish a State Energy Office and appoint an Administrator with broad powers to control the use and distribution of all fuels. On February 5, 1974 Governor Byrne issued Executive Order No. 1 in which he proclaimed the existence of an energy emergency, created the State Energy Office and established the position of Administrator of that office.

In December 1973 the Regional Plan Association issued a report on the relationship of the energy crisis to transportation. Its findings noted the decline of public mass transit in the metropolitan region and the increased consumption of fuel caused by reliance upon private automobiles to satisfy the major passenger transportation demand of the region. The Association pointed out that

> If we are serious about meeting a profligate demand for energy over the long pull, we will have to begin now to design a Region that is less energy consumptive in transportation and in its development pattern.

While the immediate effects of the oil embargo have been dissipated, the nation is still confronted with the long-range effects of oil price increases, particularly as they bear upon the economic well-being of the country. On February

21, 1974 President Nixon described the problem in these terms in a special message to Congress on the energy crisis:

> We must also face the fact that when and if the oil embargo ends, the United States will be faced with a different but no less difficult problem. Foreign oil prices have risen dramatically in recent months. If we were to increase our purchase of foreign oil, there would be a chronic balance of payments outflow which, over time, would create a severe problem in international monetary relations. [*U. S. C. Cong. and Admin. News*, 93rd Cong., 2d Sess. at 36.]

The President further observed, "it is widely recognized now that the development of better mass transit systems may be one of the key solutions to both our energy and environmental problems." *Id.* at 42. Congress has repeatedly made similar findings. For example, the Regional Rail Reorganization Act of 1973, enacted on Januar 2, 1974, contains specific findings by Congress that "rail service and rail transportation offer economic and environmental advantages with respect to * * * energy efficiency and conservation * * * to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest," and that "railroads are one of the most energy-efficient modes of transportation for the movement of passengers and freight." 45 *U. S. C. A.* §§ 701, 761.

Bondholder Reliance on the 1962 Covenant and the Effects of Repeal.

Commencing with the issuance of the 20th series of 1962 the Authority advised potential investors of the existence of and protection afforded by the 1962 covenant by including detailed reference to the covenant in the official statements distributed to the public. U. S. Trust alleges in its complaint that purchasers of the Authority's consolidated bonds relied on the notice thus given to them in making their purchases. It is also alleged that the repeal of the covenant has diminished and will continue to adversely

affect the value of the bonds in the secondary market.[30] These issues were the subject of a trial at which U. S. Trust produced four witnesses in its behalf, together with numerous exhibits. Defendants relied upon cross-examination of plaintiff's witnesses plus their own exhibits.

Port Authority consolidated bonds are known in the market place as revenue bonds, i. *e.*, they are payable solely from the revenues and reserve funds derived from the facilities operated by the Authority. In the main these bonds are sold to relatively sophisticated institutional investors either for their own accounts or for the accounts of others whose investment funds they manage. Since the bonds carry a fixed rate of return and must compete against other similar types of securities available in the market place, the interest rate fixed when the bonds are initially marketed, as well as the price of the bonds in the secondary market, will normally reflect the investor's evaluation of the underlying security of his investment and the prevailing interest rates available on similar types of securities.

Prior to 1962 the Authority had successfully marketed several hundreds of millions of dollars of its consolidated bonds without the existence of the covenant. Presumably those issues were marketed on the strength of the Authority's overall revenues and reserves as well as in reliance on the previously enacted statutory covenants and the covenants contained in the CBR. The interest rates on these bond issues varied from a low of 2¾% (the 2nd and 4th series) to a high of 4¼% (16th series). The interest rate on the last bond issue offered prior to the enactment of the covenant was 3½% (19th series).

In the early 1960's, prior to the enactment of the 1962 covenant, the likelihood of legislation directing the Authority to take over the H & M became apparent. The record strongly suggests that the Authority itself took the

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[30]The secondary market in this context refers to the over-the-counter price at which the bonds are traded after the initial offering.

initiative in arousing the concern of the investment banking community to the implications of such legislation for the future financial well-being of the Authority. Whether this action was attributable to the Authority's fear of the "disease" of mass transit, see *Goldberg*, at 22, or a legitimate concern as to the Authority's ability to absorb substantial mass transit deficits is not the point; the fact of the matter is that the Legislature of 1962 concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority.

The fact of the covenant's existence and its terms were communicated to the public and were a matter of general knowledge among investment bankers, institutional investors and dealers in Authority bonds. It may fairly be said, however, that few, if any, members of the investment community ever analysed closely the actual effect of the 1962 covenant upon bondholder security. The principal witness offered by U. S. Trust in support of its contentions, John F. Thompson, whose credentials and qualifications are impeccable, when asked to compare the protections afforded bondholders by the 1962 covenant with the restrictions imposed by the CBR (*i. e.*, the 1.3 test and the section 7 certification required by the bond series' resolutions), testified:

> Well the 1962 covenant and its requirements, require more specific determinations by the commissioners, by the staff and the commissioners as to the earnings or prospects of deficits involved, and they are — well, in the case of the Section 7 requirements, the commissioners can simply rule or state their opinion that the requirement would not harm the holders of the outstanding debt. In the case of the 1.3 times, they are permitted estimates of future earnings to some degree as well as the historical earnings. This is a test which might be complied with on the initiation of a deficit rail facility, and later be found to have not avoided deficits by any means as given the propensity of these deficits to greatly increase.
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> The determinations which must be made under the covenant, I believe, are much more susceptible to active testing, by those looking at the Port Authority from the outside, and those in the investment community a much more secure feeling about the future profitability of the Port Authority.

Based upon the testimony offered by plaintiff, the investment community's understanding of the covenant was that it in some manner furnished "security for the bondholders and it protected the diversion of the earnings of the Port Authority into deficit mass rail transit." If the covenant is to be understood in that sense, the record supports plaintiff's claim that investors relied on the covenant in purchasing Authority bonds. But while reliance existed, the covenant cannot be said to have been the "primary consideration" for the purchases having been made, for no witness testified that purchases would *not* have been made without the covenant, but only that they would not have purchased or recommended the purchase of the bonds "at the price which they were then offered."

The limited role of the covenant on the Authority's credit standing is also reflected in the ratings assigned to Port Authority bonds by the principal rating services, Moody's and Standard and Poor's. Both have rated Authority bonds as "A" bonds, meaning that they are of investment quality and no default in payment of principal or interest is anticipated. The bonds carried the same rating prior to the enactment of the covenant, after it was enacted, after it was prospectively repealed, and after the repeal act of 1974. As suggested in the reports of the rating services, the rating assigned to Port Authority bonds is an amalgam of many factors, including not only the covenant but "the Authority's strong operating, financial and management record".[31]

Following the 1962 covenant legislation the Port Authority issued 20 series of bonds prior to the enactment of the prospective repeal which became effective on May 10, 1973. The interest rates on these bonds ranged from a low of 3-1/4% (20th series) to a high of 6-5/8% (35th series). After the prospective repeal was enacted, the Authority marketed

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[31] As expressed by one of the witnesses, the Authority "has been well-run, well-organized, well-managed * * *. It's continually shown good revenues."

two additional bond issues, the 40th and 41st series, which carried interest rates of 6% and 5-1/2%, respectively. While it is claimed by plaintiff that the last two series of bonds are indirectly protected by the covenant until the "affected" bonds are retired in the year 2007, it is clear that the interest rates which the Authority has had to pay on non-affected bonds were not materially affected by the absence of direct covenant protection.

Plaintiff also attempted to show through its witnesses and exhibits that the repeal of the covenant adversely affected the secondary market for Authority bonds.[32] This conclusion was expressed by several witnesses who voiced the opinion that not only was the secondary market price of the bonds adversely affected, but that the nature of the market was altered in the sense that the market for the bonds became thin[33] and large institutional investors refused to purchase the bonds after repeal. There can be no question but that immediately following repeal and for a number of months thereafter the market price for Port Authority bonds was adversely affected. This was conclusively demonstrated by plaintiff's exhibits comparing the market price of selected Port Authority bonds, before and after repeal, with the prices of comparable bonds over the same period.

The problem presented by plaintiff's proofs, however, is that they do not show that the adverse effect attributable to the covenant repeal was permanent. Thus, immediately prior to repeal the price of Massachusetts Port Authority bonds was approximately two points higher than that quoted for New York - New Jersey Port Authority bonds having the same interest rate and a similar maturity.[34] The spread in

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[32]The repeal became effective when the concurrent New York legislation was signed by Governor Malcolm Wilson on June 15, 1974.

[33]A "thin" market is one characterized by a low volume of trading in which the price structure of the market is subject to sharp fluctuation by relatively small buy or sell orders.

[34]The bonds prices referred to in the text are derived from Exhibits P-90 and S-3 and the trial transcript.

favor of "Mass Ports" fluctuated immediately after repeal but showed a market tendency to increase until it reached a maximum of 6-1/2 points on August 2. The spread continued to fluctuate thereafter and reached a maximum of 12 points by December 13, 1974. By January 3, 1975 the spread had narrowed to three points, and never exceeded four points through January 23, 1975. By the date of the trial the spread was reduced to two points, which is the same differential that existed prior to the effective date of the repeal.

Furthermore, beginning in August 1974 there were other factors which unquestionably contributed to the adverse price differential prevailing between Port Authority bonds and those of comparable issues. On August 15, 1974 the *Wall Street Journal* carried a story detailing the Authority's problems in completing and renting space in the World Trade Center. Then, on November 10, 1974, the *New York Times* ran a multi-column feature story with the headline "Port Authority Has Fallen on Hard Times." This story, like the one carried by the *Wall Street Journal* in August, referred to the Authority's difficulties at the World Trade Center and its losses on that project, estimated in the article to be as high as $25,000,000 a year.[35] The article also suggested that other Authority facilities which formerly had been profitable were breaking even or losing money. It is to be noted that Port Authority bonds suffered their sharpest decline for the whole period under review during the one month period following the *New York Times* article. On November 8, 1974 the bonds were quoted at 78, and by December 13, 1974 the price had dropped to 65.

The bottom line of plaintiff's proofs on this issue is simply that the evidence fails to demonstrate that the secondary market price of Authority bonds was adversely affected by the

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[35]The latest available figures disclose that the World Trade Center incurred a deficit for the year 1973 of $16,460,000.

repeal of the covenant, except for a short-term fall-off in price, the effect of which has now been dissipated insofar as it can be related to the enactment of the repeal

The Validity of the Repeal of the Covenant.

[2] Plaintiff's position here is premised on the proposition that the 1962 covenant legislation created a contract between the States of New Jersey and New York and the bondholders of the Port Authority which prohibited the use of Port Authority revenues and reserve funds for passenger railroad purposes except as expressly permitted by the terms of the act. The repeal act of 1974, it is said, impairs the obligation of that contract in violation of *U. S. Const.*, Art. I, § 10 of the United States ("No State shall * * * pass any * * * Law impairing the Obligation of Contract * * *") and *N. J. Const.* (1947), Art. IV, § VII, par. 3. ("The Legislature shall not pass any * * * law impairing the obligation of contracts * * *").[36]

[3] At the outset it is essential to define the terms of the contract and the nature of the impairment claimed by plaintiff. When the 1962 covenant was enacted there was in existence the CBR of 1952, pursuant to which the Authority had pledged its net revenues and the reserve funds as security

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[36]Plaintiff also urges that the repeal act contravenes the Fifth and Fourteenth Amendments of the United States Constitution and Article I, par. 20 of the New Jersey Constitution. The contention is that the repeal constituted a "taking" of property without due process of law, *i. e.*, just compensation. This issue will not be considered in this opinion for the following reasons: (1) to the extent that the claim is based upon an alleged reduction in the secondary market price of Authority bonds, it has been factually rejected *supra*, and (2) the test of constitutional validity as applied to repeal legislation is the same under the Contract and Due Process Clauses, *i. e.*, if an unlawful impairment has occurred there has been a "taking," and if not, then there is no taking. See *Veix v. Sixth Ward B. & L. Ass'n*, 310 *U. S.* 32, 41, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); *Lynch v. United States*, 292 *U. S.* 571, 578–581, 54 S. Ct. 840, 78 L. Ed. 1434 (1934); Hale, "The Supreme Court and the Contract Clause: III," 57 *Harv. L. Rev.* 852, 890 (1944).

for the payment of debt service on all consolidated bonds. The CBR and the series' resolutions, pursuant to which all outstanding consolidated bonds were issued, constitute a contract between the bondholders and the Authority, and that contract was unaffected by the enactment of the 1962 covenant. The covenant superimposed upon the security provisions of the CBR and the series' resolutions the further agreement of the states that neither the Authority's revenues nor its reserve funds would be used for any additional passenger railroad facility whose estimated deficit would exceed 10% of the amount in the general reserve fund.[37] To the extent that the repeal of the covenant authorizes the Authority to assume greater deficits for such purposes, it permits a diminution of the pledged revenues and reserves and may be said to constitute an impairment of the states' contract with the bondholders.[38] *Bronson v. Kinzie*, 42 *U. S.* (1 *How.*) 311, 11 L. Ed. 143 (1843); *Planters' Bank of Miss. v. Sharp*, 47 *U. S.* (6 *How.*) 301, 327, 12 L. Ed. 447 (1848); *Hawthorne v. Calef*, 69 *U. S.* (2 *Wall.*) 10, 17 L. Ed. 776 (1864); *Von Hoffman v. City of Quincy*, 71 *U. S.* (4 *Wall.*) 535, 18 L. Ed. 403 (1867); *W. B. Worthen Co. v. Kavanaugh*, 295 *U. S.* 56, 55 S. Ct. 555, 79 L. Ed. 1298 (1935); *New Jersey Highway Authority v. Sills*, 109 *N. J. Super.* 424 (Ch. Div. 1970), supplemented 111 *N. J. Super.* 313 (Ch. Div.

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[37]The statutory formula for permitted deficits is set forth in more precise detail, *supra* at 162–163.

[38]It is not disputed by defendants that a legislative enactment, such as the 1962 covenant, may constitute a contract. Such has been the law since *Fletcher v. Peck*, 10 *U. S.* (6 Cranch.) 87, 3 L. Ed. 162 (1810). See also, *New Jersey v. Yard*, 95 *U. S.* 104, 114, 24 L. Ed. 352 (1877), where the court said: "It has become the established law of this Court that a legislative enactment * * * may contain provisions which * * * become contracts * * * within the protection of the [Contract Clause]." The legislative history associated with the enactment of the 1962 covenant as well as the statutory language used establish fairly conclusively that the Legislature intended the covenant to be a contract between the states and the bondholders of the Authority.

1970), aff'd 58 *N. J.* 432 (1971); *First Nat'l Bank of Boston v. Main Tpke. Auth.*, 153 *Me.* 131, 136 *A.* 2d 699 (Sup. Jud. Ct. 1957).

[4] The Contract Clause addresses itself not only to the obligation, but also to the remedy and the security furnished to enforce the obligation and assure its performance. The first expression of this view of the Contract Clause occurs in *Green v. Biddle*, 21 *U. S.* (8 *Wheat.*) 1, 5 L. Ed. 547 (1823), which arose out of a compact between Virginia and Kentucky creating the latter as a separate state. Under the terms of the compact Kentucky agreed that all private rights and land titles derived from the laws of Virginia would "remain valid and secure" under Kentucky law. Thereafter, Kentucky enacted a series of laws designed to diminish and impede the remedies available to Virginia claimants to recover possession and the rents and profits of lands occupied by Kentucky residents. In holding the legislation invalid under the Contract Clause, Justice Story said:

> It is no answer that acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." [21 *U. S.* (8 *Wheat.*) at 17].[39]

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[39]Upon rehearing in *Green v. Biddle*, Justice Washington delivered the opinion of the court containing perhaps the most extreme expression of the reach of the Contract Clause rendered by the court:

> The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however, minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. [21 *U. S.* (8 *Wheat.*) at 8488]

In contrast to the language of Justice Story quoted in the text above, Justice Washington states that *any* impairment, whether or not material to the obligation, violates the Contract Clause. It is

In *Von Hoffman v. City of Quincy, supra*, bonds were issued by a city under existing Illinois law which authorized a special property tax to be levied in an amount sufficient to pay the interest on the bonds. The taxes thus collected were to be held in a separate fund specially pledged for the payment of the interest and not to be used for any other purpose. Subsequently, the legislature enacted a statute which limited the rate of property tax that could be levied by municipalities, and repealed the prior law authorizing the levy of a special tax for the benefit of bondholders. The property taxes collected by the city under the new law were insufficient to pay the interest due on the bonds. A bondholder instituted suit against the city and judgment was entered in his favor for the amount of interest owed on the bonds. The city failed to pay the judgment and refused to levy a property tax for such purpose. The judgment creditor thereupon sought a writ of *mandamus* to compel the city to pay the judgment or to levy a special tax. In its defense the city relied upon the repeal legislation as constituting a valid exercise of the state's sovereign power with respect to future public revenues, as to which it urged no binding contract could exist.[40] The court held the repeal legislation to be an invalid impairment under the Contract Clause. The court reaffirmed the doctrine laid down by Justice Story in *Green v. Biddle, supra*, this time describing the prohibited area in terms of an impairment of "substantial" rights, rather than a "material" impairment.

> It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy,

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doubtful whether this view was ever embraced by the court at any time. But see *Planters' Bank of Miss. v. Sharp*, 47 *U. S.* (6 *How.*) 301, 327, 12 L. Ed. 447 (1848); *Ogden v. Saunders*, 25 *U. S.* (12 *Wheat.*) 213, 256, 6 L. Ed. 606 (1827).

[40]The Supreme Court had earlier rejected this argument in a different context. See *New Jersey v. Wilson*, 11 *U. S.* (7 *Cranch.*) 164, 3 L. Ed. 303 (1812).

which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the Act is within the prohibition of the Constitution, and to that extent void. [71 *U. S.* at 553].

In its analysis of the issue presented the court viewed the question as addressing itself to the impairment of a remedy. However, the "remedy" in this context is actually the security furnished for the payment of the obligation, *i. e.*, the authorization to levy a special property tax to pay the interest on the bonds.

This line of authority culminates in *W. B. Worthen Co. v. Kavanaugh, supra,* one of the last adjudications by the Supreme Court declaring repeal or amendatory legislation invalid under the Contract Clause. In *Kavanaugh* bonds had been issued by a municipal improvement district organized under the laws of Arkansas. At the time of issuance the statutory scheme to secure payment of the bonds provided for mortgage benefit assessments to be made against each parcel of property which "contained provisions well planned to make these benefit assessments an acceptable security." 295 *U. S.* at 57, 55 S. Ct. at 555. Thereafter, the legislature amended the statute so as to modify the procedures relative to defaulted obligations. The interest and penalties payable on default were substantially reduced, the time in which the property was to be sold for nonpayment was extended from 65 days to 2½ years, and the property owner was permitted to remain in possession with a right of redemption for a further period of four years without accounting for rents. The court struck down the subsequent legislation under the Contract Clause and in the course of doing so it gave a more precise definition of what constitutes a prohibited impairment. Speaking for the court Justice Cardozo said:

> In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. * * * The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. * * * We state the outermost limits only. In stating them we do not exclude the possibility that the bounds are even narrower. The case does not call for definition more precise. A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor.
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> Whether one or more of the changes effected by these statutes would be reasonable and valid if separated from the others, there is no occasion to consider. A state is free to regulate the procedure in its courts even with reference to contracts already made * * * and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow. * * * What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security. [295 *U. S.* at 60, 62, 55 S. Ct. at 557].

[5, 6] As the language of the court in the cases cited above makes manifest, not every impairment of a contract obligation or security for its performance runs afoul of the Contract Clause; a state acting under its reserved police powers may alter its remedial processes and thereby diminish contractual security provided it does not destroy its quality as "an acceptable investment for a rational investor." This view of the Contract Clause has its origin in the concurring opinion of Justice Johnson in *Fletcher v. Peck,* 10 *U. S.* (6 *Cranch*) 87, 145, 3 *L. Ed.* 162 (1810). See *Hale, supra* at 873. Justice Johnson's conception of the states' reserved power under the Contract Clause was cogently expressed in his dissenting opinion in *Ogden v. Saunders,* 25 *U. S.* (12 *Wheat.*) 213, 6 L. Ed. 606 (1827), where he said:

> Societies exercise a positive control as well over the inception, construction, and fulfillment of contracts, as over the form and measure of the remedy to enforce them.
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> It is, therefore, far from being true, as a general proposition, "that a government necessarily violates the obligation of a contract which it puts an end to without performance." It is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts. [25 *U. S.* (12 *Wheat.*) at 286, 291.]

[7] Justice Johnson's formulation of the police power doctrine as applied to the Contract Clause was quoted with approval and forms the rationale for the court's decision in *Home B. & L. Ass'n v. Blaisdell,* 290 *U. S.* 398, 428–429, 54 S. Ct. 231, 78 L. Ed. 413 (1933). During the span of more than a century between *Ogden v. Saunders* and *Blaisdell* the court had held on numerous occasions that the states retained the power to impair contractual obligations — including those to which the state was a party — in the exercise of their always reserved police powers to act in the interest of the public health, safety and general welfare.[41] First in dictum, *Boyd v. Alabama,* 94 *U. S.* 645, 650, 24 L. Ed. 302 (1877), and then by direct application of the doctrine, the court held that a lottery franchise granted for a definite term of years could be repealed. *Stone v. Mississippi,* 101 *U. S.* 814, 25 L. Ed. 1079 (1880); *Douglas v. Kentucky,* 168 *U. S.* 488, 18 S. Ct. 199, 42 L. Ed. 553 (1897). In *Northwestern Fertilizing Co. v. Hyde Park,* 97 *U. S.* 659, 24 L. Ed. 1036 (1878), it was held that a franchise to operate a fertilizer factory at a given location could be negated by the exercise of the police power to abate a nuisance. Similarly, the power to control the use of the public streets may not be bargained away, *Atlantic Coast Line R. Co. v. Goldsboro,* 232 *U. S.* 548, 34

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[41] For a more detailed discussion of the development of the doctrine, see *Wright, The Contract Clause and the Constitution,* 196–213 (1938).

S. Ct. 364, 58 L. Ed. 721 (1914); *Denver & Rio Grande R. Co. v. Denver,* 250 *U. S.* 241, 39 S. Ct. 450, 63 L. Ed. 958 (1919), nor can the state contractually bind itself not to exercise its power of eminent domain, *West River Bridge Co. v. Dix,* 47 *U. S.* (6 How.) 507, 12 L. Ed. 535 (1848); *Pennsylvania Hospital v. Philadelphia,* 245 *U. S.* 20, 38 S. Ct. 35, 62 L. Ed. 124 (1917), or to change the location of its governmental subdivisions, *Newton v. Mahoning County,* 100 *U. S.* 548, 25 L. Ed. 710 (1880). The broadest expression of this view of the police power during this period is to be found in *Chicago & Alton R. R. v. Tranbarger,* 238 *U. S.* 67, 35 S. Ct. 678, 59 L. Ed. 1204 (1915), where Justice Pitney said:

> It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution [the Contract and Due Process Clauses] has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare o the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise * * *. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of public health, morals or safety. [238 *U. S.* at 76–77, 35 S. Ct. at 682]

The issue before the court in *Blaisdell* was the validity of the Minnesota Mortgage Moratorium Law. Once again the question was whether the state could exercise its sovereign power to impair the security provisions for the payment of a debt by a significant alteration of the remedies available for its enforcement. The act provided that during the economic emergency declared to exist, the state courts could upon application and notice extend the period of redemption from foreclosure sales and fix the rental value to be paid by the mortgagor in possession. The act also barred any action for a deficiency judgment until after the expiration of the redemption period. The court upheld the con-

stitutionality of the act, and Chief Justice Charles Evans Hughes described the reach of the Contract Clause:

> To ascertain the scope of the constitutional prohibition, we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.
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> Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." *Stephenson v. Binford*, 287 *U. S.* 251, 276, 53 *S. Ct.* 181, 189, 77 *L. Ed.* 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, — a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.
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> [290 *U. S.* at 428, 434–5, 54 S. Ct. at 236]

[8–10] The line of demarcation between *Blaisdell* and *Kavanaugh* may be expressed as one of degree: The states' inherent power to protect the public welfare may be validly exercised under the Contract Clause even if it impairs a contractual obligation so long as it does not destroy it. While Blaisdell placed great emphasis upon the emergency character of the Minnesota law to validate the action taken, decisions of the court since then have sanctioned nonemergent legislation impairing contractual rights and remedies where necessary to protect the economic well being of the state. See *Veix v. Sixth Ward B. & L. Ass'n of Newark*, 310 *U. S.* 32, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); *Gelfert v. National City Bank*, 313 *U. S.* 221, 61 S. Ct. 898, 85 L. Ed. 1299 (1941). Furthermore, in keeping with the principles set forth in *Kavanaugh*, we must deal with realities and not abstractions, for "[t]he Constitution is 'in-

tended to preserve practical and substantial rights, not to maintain theories.'" *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 *U. S.* 502, 514, 62 S. Ct. 1129, 1133, 86 L. Ed. 1629 (1942).

The most recent case dealing with the issue, and that upon which defendants place greatest reliance, is *City of El Paso v. Simmons*, 379 *U. S.* 497, 85 S. Ct. 577, 13 L. Ed. 2d 446, reh. den. 380 *U. S.* 926, 85 S. Ct. 879, 13 L. Ed. 2d 813 (1965). The facts of the case may be briefly summarized. Texas law had provided for the sale of public lands on easy credit terms to raise money for school funds and to encourage land settlement. The credit terms set forth in the law governing such sales included a provision permitting the contract owner, were the land forfeited back to the State for nonpayment of interest, an unlimited time in which to reinstate the contract by payment of back interest, subject only to the rights of intervening third persons. In 1941, after a history of land title disputes and rampant speculation in such lands, Texas limited the right of reinstatement to five years. Upon expiration of this five-year period the State would have clear title. Simmons, owner of a quitclaim deed to land contracted for in 1910, had not made timely payment of the interest arrearages. His contract title was forfeited by the state which subsequently transferred the land to the City of El Paso. He instituted suit against the city to determine title to the land, urging that the 1941 law was a violation of the Contract Clause since it not only impaired his contractual right of reinstatement but destroyed it completely.

The 1941 legislation was held by the court to constitute a valid exercise of the state's power to modify or affect the obligation of its contracts. The essential question, in the court's view, was not whether the statute impaired the "obligation" or the "remedy", for not "every modification of a contractual promise * * * [or] every alteration of existing remedies * * * violates the Contract Clause." 379

U. S. at 506–507, 85 S. Ct. at 582. Rather, the question was whether the modification of the contractual obligation to reinstate the purchaser's title was reasonable on the facts disclosed. Citing the legislative history, the court noted that Texas had a vital interest in "the integrity of land titles" and in the administration "of its property in a businesslike manner" (379 *U. S.* at 511–12, 85 S. Ct. at 585) and

> • • • [t]he Contract Clause of the Constitution does not render Texas powerless to take effective and necessary measures to deal with [these matters]. • • • [T]he promise of reinstatement, whether deemed remedial or substantive, was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking. • • • We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defeasible [*sic*] right to reinstatement in case of his failure to perform • • •. We, like the Court in *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 *U. S.* 502, 514, 62 *S. Ct.* 1129, 1135, 86 *L. Ed.* 1629, believe that "[t]he Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' • • •." 379 *U. S.* at 513–515, 85 S. Ct. at 586.
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> The measure taken to induce defaulting purchasers to comply with their contracts • • • was a mild one, indeed, hardly burdensome to the purchaser who wanted to adhere to his contract of purchase, but nonetheless an important one to the State's interest. The Contract Clause does not forbid such a measure. [379 *U. S.* at 516–517, 85 S. Ct. at 588]

The view of the Contract Clause and its subservience to the police power as expressed in *Blaisdell* and *El Paso* coincides with the interpretation placed upon the Contract Clause of the New Jersey Constitution as interpreted by our highest courts. Thus, in *Hourigan v. North Bergen Tp.*, 113 *N. J. L.* 143 (E. & A. 1934), Justice Heher cited *Blaisdell* with approval for the proposition that "the reservation of essential attributes of sovereign power" is to be read into the contracts of the State. He there defined the police power as

> • • • an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people and [it] is paramount to any rights under contracts between individuals. While this power is subject to limitations in certain cases, there is a wide discretion on the part of the legislature in determining what is and what is not necessary — a discretion which courts ordinarily will not interfere with. [at 149]

[11] Neither *New Jersey Highway Auth. v. Sills, supra,* nor *New Jersey Sports & Expos. Auth. v. McCrane,* 61 *N. J.* 1 (1972), app. dism. 409 *U. S.* 943, 93 S. Ct. 270, 34 L. Ed. 2d 215 (1972), suggests that our present Supreme Court has adopted a narrower interpretation of the Contract Clause of either the State or the Federal Constitutions. In *Sills* the court viewed a statute exempting National Guardsmen from the payment of tolls on the Parkway as "ordinary and relatively unimportant legislation" not intended to deal with "any problem of state-wide importance" as was the case in *El Paso* (111 *N. J. Super.* at 320). And in *McCrane* the Supreme Court expressly affirmed that while a contract between the State and the bondholders of an independent governmental authority is entitled to protection under the State and Federal Constitutions, such contracts are nevertheless subject to "a proper exercise of the State's never abdicated police powers." 61 *N. J.* at 26.[42]

[12] The history of the creation and evolution of the Port Authority establishes beyond peradventure that it was intended by the states and by the Congress to perform govern-

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[42] In their brief and at oral argument defendants ask the court to pass upon the validity of the New York repeal act under the New York Constitution. While it would unquestionably be desirable to do so in the interest of resolving all issues within the context of this litigation, that question should be left to the New York courts for decision. *Cf. Interstate Wrecking Co. v. Palisades Interstate Park Comm'n,* 57 *N. J.* 342, 352 (1971). It may be noted that U. S. Trust has filed a declaratory judgment action in the New York Supreme Court which is presently pending.

mental functions necessary and vital to the public safety, health and welfare of the citizens of the two states and the nation as well. *Cf. Comm'r of Int. Rev. v. Ten Eyck*, 76 *F.* 2d 515, 518 (2 Cir. 1935). The states have a continuing interest in and can never abdicate their sovereign powers to control and direct the activities of the Authority to meet the everchanging needs of a complex society. See *Blaisdell, supra*, 290 U. S. at 442, 54 S. Ct. 231. Senator Farley summed it up when he advised Commissioner Kellogg in 1961:

*** * * I appreciate that if the Legislature directs you to enter into a contract involving the issuance of bonds, there will be no impairment of obligations of contract, but I must call to your attention and the members of your Commission that one Legislature cannot bind a subsequent Legislature involving policy. If, perchance, may I illustrate — ten, fifteen, twenty years from now the respective legislatures of New York and New Jersey importune your Port Authority Commission to do something in addition involving public service, one legislature cannot bind another involving policy. [*Supra* at 157]**

The interest of the states in the development of a coordinated system of public and private transportation within the Port District has been spread on the public record for more than 50 years, and legislative action to accomplish that objective clearly involves an exercise by the states of their fundamental sovereign powers. The enactment of the 1962 covenant was indeed an attempt to satisfy an immediate public need to preserve the H&M as a viable public transportation system. The passage of time and events between 1962 and 1974 satisfied the Legislatures of the two states that the public interest which the Port Authority was intended to serve could not be met within the terms of the covenant.

[13, 14] The events which occurred between the passage of the covenant and its repeal are described elsewhere in this opinion (*supra* at 167–176) and need not be detailed again. Suffice it to say that between 1962 and 1974 the security afforded bondholders had been substantially augmented by a vast increase in Authority revenues and reserves, and the Authority's financial ability to absorb greater deficits, from

whatever source and without any significant impairment of bondholder security, was correspondingly increased.[43] During the same interval mass transit facilities within the District continued to deteriorate while the public need for such facilities became unprecedented as the result of the promulgation of stringent federal air pollution regulations designed to reduce automobile usage and the emergence of an energy crisis which threatened the entire system of private automobile transportation in the two States.[44]

The motive, the policy [and] the object" of the repeal legislation, read against its background, was to further a vital interest of the states which their Legislatures deemed to be essential to the public good. The question is whether the exercise of such power falls within the prohibited scope fo the Contract Clause, or does it, in the language of Chief Justice Hughes in *Blaisdell*, represent "a rational compromise between the individual rights and the public welfare." 290 *U. S.* at 442, 54 S. Ct. at 241.

Conceding the existence of some impairment of bondholder security as a result of the repeal, has the action of

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[43]Between 1961 and 1973 the net revenues of the Authority increased from $68,000,000 to $137,000,000, and over that period the Authority had available to it $582,732,000 in excess of its debt service requirements, after taking into account the deficits of the H&M. Through 1974, the corresponding figures are $161,283,000 and $649,750,000, respectively.

[44]Plaintiff urges that none of the legislative history (detailed at 167–176, *supra*) which preceded the repeal of the covenant should be considered relevant to the question of whether the repeal constituted a reasonable exercise of the states' police powers inasmuch as the repeal legislation was unnecessary and the Legislature made no findings or declarations with respect to such matters. A judgment as to the necessity of the legislation is for the Legislature and not the courts. See *Hourigan v. North Bergen Tp.*, *supra* 113 *N. J. L.* at 149. Nor is the Legislature required to make explicit findings and declarations within the context of the legislation to support an exercise of the police power. See *Gelfert v. Nat'l. City Bank of N. Y.*, *supra* 313 *U. S.* at 235, 61 S. Ct. 898; *Bucsi v. Longworth B. & L. Ass'n*, 119 *N. J. L.* 120, 122 (E. & A. 1937), app. dism. 305 *U. S.* 665, 59 S. Ct. 154, 83 L. Ed. 431 (1938).

the states destroyed the quality of their security as an "acceptable investment for a rational investor"? The repeal, of course, leaves intact the provisions of the CBR and the series resolutions which now constitute, together with the General Reserve Fund Act, the same measure of the bondholders' contractual security rights as existed prior to the enactment of the covenant in 1962. Presumably, rational investors—including plaintiff—purchased hundreds of millions of dollars of consolidated bonds prior to 1962, without the additional security afforded by the covenant and with full knowledge of the power of the states to direct the Authority into mass transit operations. The two principal bond rating services, upon whose judgment the financial community places great reliance, rated the consolidated bonds—minus the covenant—as securities as to which no default was anticipated.

The claim that bondholder security has been materially impaired or destroyed by the repeal is simply not supported by the record. The pledge of the Authority's net revenues and reserves remains intact; the Authority will still be barred from the issuance of any new consolidated bonds unless the 1.3 test required by the CBR is met, and the Authority will continue to be prohibited from the issuance of any consolidated bonds or other bonds secured by a pledge of the general reserve fund without the certification required by section 7 of the series resolutions, to wit, that in the opinion of the Authority the estimated expenditures in connection with any additional facility for which such bonds are to be issued would not, for the ensuing ten years, impair the sound credit standing of the Authority, the investment status of its consolidated bonds, or the Authority's obligations to its consolidated bondholders.

[15] Plaintiff's claim of an unconstitutional impairment is predicated upon such slender reeds as the assertion that the "quality" of the certification required under the CBR and section 7 need not be as "objective" as that required under the covenant; the speculation that the good judgment of the Authority's commissioners in making the necessary

certifications will be overborn by the "political pressures" exerted by the Governors of the States,[45] and the self-flagellating prospect that the states will conspire to "give" the New York City subway system to the Authority and thereby destroy not only the bondholders' security but the Port Authority as well. But as the court stressed in *Faitoute, supra,* constitutional questions must be decided in the world of reality and not by resort to abstract speculations of the kind offered by plaintiff.

[16, 17] The thrust of plaintiff's argument is that any impairment of the security provisions of a contract violates the Contract Clause. It seeks to recreate a theory of the Contract Clause which, if ever imbedded in our constitutional law, no longer exists. As reflected in the course of more than 150 years of its judicial interpretation, the Contract Clause must be construed in harmony with the power of the states to alter or modify their contractual obligations where an important public interest requires. Those who enter into contractual relations with the sovereign, including the bondholders of the Port Authority, are chargeable with the knowledge that it is a sovereign entity with which they are dealing and that "the reservation of [the] essential attributes of sovereign power" is as much a part of their contract as that which is expressly stated.

[18] It is the judgment of this court that the repeal legislation was a reasonable and hence valid exercise of the states' police power which is not prohibited by the Contract Clause of either the Federal or the State Constitution. An order will therefore be entered dismissing the complaint of plaintiff and in favor of defendants on so much of their counterclaim as seeks a declaratory judgment with respect to the constitutional validity of *chapter* 25 of the *Laws of* 1974.

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[45]At the same time plaintiff argues that the covenant's requirement of a certification by the Governors is an "added" protection afforded them by the covenant.

In view of the court's holding in the U. S. Trust action, defendant's third separate defense (asserting the invalidity of the 1962 covenant) and the complaint in the *Gaby* action will be dismissed. See *Wagner v. Ligham*, 37 *N. J. Super.* 430 (App. Div. 1955).

 Filed—May 20, 1970

APPENDIX C

Notice of Appeal to the Supreme Court of the United States

SUPREME COURT OF NEW JERSEY

DOCKET NO. 11498

UNITED STATES TRUST COMPANY OF NEW YORK, etc.,

Appellant,

v.

THE STATE OF NEW JERSEY, *et al.*,

Appellees,

DANIEL M. GABY,

Appellant,

v.

THE PORT OF NEW YORK AUTHORITY, *et al.*,

Appellee,

and

UNITED STATES TRUST COMPANY OF NEW YORK, etc.,

Intervenor.

Notice is hereby given that Daniel M. Gaby, the Appellant above named, hereby appeals to the Supreme Court

Appendix C

of the United States from the final judgment of the Supreme Court of New Jersey affirming the judgment of the Superior Court of New Jersey, Law Division, Bergen County, in this action, which judgment of the Supreme Court of New Jersey was entered on February 25, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

SHAVICK, STERN, SCHOTZ, STEIGER & CROLAND, ESQS.
By: HOWARD STERN

THEODORE W. KHEEL, ESQ.
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1712

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

DANIEL M. GABY,

Appellant,

v.

THE PORT OF NEW YORK AUTHORITY, *et al.*,

and

Appellees,

UNITED STATES TRUST COMPANY OF NEW YORK,

Intervenor-Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS APPEAL

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June 7, 1976

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IN THE

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OCTOBER TERM, 1975

No. 75-1712

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

DANIEL M. GABY,

Appellant,

v.

THE PORT OF NEW YORK AUTHORITY, *et al.*,

Appellees,

and

UNITED STATES TRUST COMPANY OF NEW YORK,

Intervenor-Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS APPEAL

Pursuant to Rule 16 of the Revised Ruies of this Court, Intervenor-Appellee United States Trust Co[illegible]ay of New York moves to dismiss the appeal of Appellant Daniel M. Gaby for want of a substantial federal question.

ARGUMENT

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION; THE 1962 COVENANT WHEN ENACTED WAS CONSTITUTIONAL IN ALL RESPECTS

Appellant's argument that the 1962 Covenant is void because not consented to by Congress does not raise a substantial federal question because (1) Congress in fact did consent to the legislation embodying the 1962 Covenant, and (2) such consent was not even required under settled principles of law.

Appellant's entire appeal rests upon the premise that the movement of persons within the Port District was an important, fundamental and integral part of the plan of port development authorized by Congress in approving the Port Authority Compact; that the 1962 Covenant was in derogation of this mandate rather than in furtherance of it and, therefore, Congressional consent to the Covenant was necessary. (JS 4)

Appellant's case must fail because his premise is based on error. First, rail transportation of persons, while technically authorized by a broad construction of the Compact, was not a problem even considered in 1921 and 1922. Second, even if rail transportation of persons were of importance in the Compact, the Covenant, permitting rather than prohibiting the Port Authority's participation in mass rail transit, was clearly in furtherance of the Compact and, therefore, did not require Congressional consent.

Appellant attempts to rewrite history. The Port Authority was created to coordinate and operate freight, rather than passenger, transportation facilities in the Port of New York. The factual conclusions of the Superior Court, based upon the record below, compel this conclusion:

> "[T]he railroad problem upon which the Commission [the New York, New Jersey Port and Harbor Development Commission, which recommended the establishment of the Port Authority] focused was not that of passenger transit but the handling and distribution of freight and cargo into and out of the Port District, and the comprehensive plan recommended by the Commission *addressed itself exclusively to the transportation and distribution, not of persons but of freight and cargo by rail, and to a lesser extent by ship and motor truck.* In its 474 pages plus appendices, the only significant discussion of passenger traffic in the *Report* is contained in the section dealing with ferries and vehicular tunnels." (A* 47-48) (emphasis added).

Speaking of the Port Authority's 1922 Comprehensive Plan, the Superior Court said:

> "In the Plan, like the *Report* upon which it was based, unification of terminal operations and facilities, consolidation of shipments, adaptation and coordination of existing facilities, improvement of commercial rail, truck and water facilities and other freight handling improvements are set forth as principles to govern the development of the Port Authority. The Comprehensive Plan proposed to establish direct rail freight connections between New Jersey and Manhattan to furnish 'the most expeditious, economical and practical transportation of freight especially meat, produce, milk and other commodities comprising the daily needs of the people.' N.J.S.A. 32:1-29." (A 50).

The North Jersey Transit Commission recognized in 1927 that the Port Authority was an especially *inappropriate* agency to deal with the passenger transit problem, since it was denied the taxing power considered necessary to any solution of the problem (Stip.** 74). In the same year the

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* "A" references are to the pages of Appellant Gaby's Appendix to his Jurisdictional Statement.

** "Stip." references are to the pages of the Stipulation of Fact among counsel for the parties to *United States Trust Company of New York* v. *The State of New Jersey, et al.*, dated December 20, 1974; neither counsel for Appellant Gaby nor counsel for the Port Authority defendants in *Gaby* are parties to the Stipulation, but we do not object to Appellant's repeated citations to the Stipulation since the cited references are, without exception, based upon legislative history or reports subject to mandatory or permissive judicial notice.

New Jersey Legislature directed the Port Authority to assist in mass transit *planning* (Stip. 75), but even this modest incursion on the agency's freight coordination obligations was condemned by Governor Smith of New York, a key figure in the Port Authority's organization (Stip. 76 to 77). Contrary to Appellant's insinuation, (JS 6), Governor Smith's veto of this proposal did not even *suggest* that he viewed the freight problem as only an "initial objective" of the agency. Rather, he viewed it as, in his own words, "the main object and purpose of the Port of New York Authority." (Stip. 77).

In 1959 the two States concluded an interstate compact, which received Congressional consent, establishing the New York-New Jersey Transportation Agency to assume responsibility for public mass transit between the two States. (Stip. 125 to 128). The establishment of this Agency is inexplicable if, as Appellant asserts, the Port Authority already had primary responsibility in this area.

Appellant's Jurisdictional Statement asserts that the 1962 Covenant "effectively made it impossible for the states legislatively to authorize the Authority to plan, coordinate or implement plans for mass transit." (JS 19). Quite the contrary, it was only through enactment of the Covenant that the required private financing was obtained which enabled the Port Authority, for the first time in its history, to assume financial responsibility for a major passenger rail network. It must be remembered that the Port Authority is a self-supporting agency, entirely dependent for its survival on the issuance of revenue bonds to private investors. As the Superior Court said:

> "[T]he fact of the matter is that the Legislature of 1962 concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority." (A 90).

Nor would the Covenant now stand as a bar to further Port Authority involvement in deficit rail mass transit. It only says that such involvement will be limited to a percentage of the reserves which secure outstanding Port Authority Consolidated Bonds.* The Covenant does not prohibit Port Authority responsibility for a rail mass transit system which can be made self supporting, or for mass transit systems other than rail systems. It does not prohibit Port Authority involvement through a State guarantee of the necessary financing, analogous to the Authority's Commuter Car Program, or with a combination of bondholder consent (expressly contemplated by the Covenant) and advance refunding of affected Consolidated Bonds. It does not in any way preclude other State action in rail mass transit, either directly or through one of their other agencies directly charged with this responsibility.**

A. Congressional consent to the 1962 Covenant was given in advance in 1921 and 1922 when the Bi-State Compact and Comprehensive Plan were approved by Congress.

Appellant's argument that the 1962 Covenant did not receive Congressional consent ignores the fact that this

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* In fact, it was expected that this limitation would permit additional involvement in rail mass transit, but the PATH deficit has vastly exceeded the permitted maximum as a result of the adamant refusal of the Governors of New Jersey and New York to permit the agency to raise PATH fares to competitive levels. (See Stip. 220 to 222).

** As noted by Judge Tyler in *Kheel* v. *Port of New York Authority*, 331 F. Supp. 118 (S.D.N.Y. 1971), *aff'd on other grounds*, 457 F.2d 46 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972):

> "[T]he transit amendment's constraint upon non-self-supporting rail facilities does not *even temporarily* preclude the state legislatures from dealing with mass transit problems by other means, e.g. by enactment of subsidy programs. In these circumstances, the constitutional infringement claimed is illusory." 331 F. Supp. at 122. (emphasis added.)

Court has decided that the legislation embodying the Covenant did not require additional Congressional consent. In *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority,* 12 N.Y.2d 379, 391, *appeal dismissed for want of a substantial federal question,* 375 U.S. 78, *rehearing denied,* 375 U.S. 960 (1963), the New York Court of Appeals held:

> "[A]ssuming consent to be required for this sort of concurrent action, *the congressional consent originally given in* 1921 *and* 1922 *to the bi-State compact creating the Port Authority expressly contemplated such further co-operative legislation in furtherance of port purposes as was here accomplished.* (Pub. Res. No. 17, 67th Cong., 1st Sess., 42 U.S. Stat. 174; Pub. Res. No. 66, 67th Cong., 2d Sess., 42 U.S. Stat. 822.) Among the Articles of Agreement consented to were articles III, VII and VI, which created the Port Authority with the powers enumerated plus 'such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other.' Similarly, article XI, following the agreement for an initial comprehensive plan in article X, provides that the Port Authority should 'from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two states, they shall be binding upon both states with the same force and effect as if incorporated in this agreement.' *Chapter* 209 [the legislation embodying the 1962 Covenant] *clearly falls within the congressional consent given to the articles contemplating the grant to the Port Authority of additional powers within the framework of the compact.*" (emphasis added.)

Appellant does not even cite, let alone distinguish *Courtesy* in his Jurisdictional Statement, although the appeal to this Court in that case was dismissed for want of a substantial federal question (375 U.S. 78), a decision on the merits. A

petition for rehearing was denied (375 U.S. 960). Although *Courtesy* dealt with the 1962 legislation as a whole and not expressly with the validity of the Covenant, its rule of law is dispositive.* The Covenant clearly falls within "such further co-operative legislation in furtherance of port purposes" to which Congress consented in advance, and it constitutes on its face the type of "cordial cooperation in the encouragement of the investment of capital" expressly contemplated by the States in their Compact. *Courtesy* is thus dispositive of the issue of the necessity for congressional consent. *E.g., Hicks* v. *Miranda,* 422 U.S. 332 (1975); *Ohio ex rel. Eaton* v. *Price,* 360 U.S 246, 247 (1959); *Doe* v. *Hodgson,* 500 F.2d 1206 (2d Cir. 1974); *Hall* v. *Thornton,* 445 F.2d 834, 835 (4th Cir. 1971); *Port Authority Bondholders Protective Comm.* v. *Port of New York Authority,* 387 F.2d 259, 262, 263 (2d Cir. 1967); *Cf. Borough of Moonachie* v. *Port of New York Authority,* 38 N.J. 414, 425 (1962).

B. Congressional consent was not required for the 1962 Covenant.

It is well settled that only those undertakings between states which alter the political balance among the states or interfere with federal jurisdiction require congressional consent. *St. Louis & S.F. Ry.* v. *James,* 161 U.S. 545, 562 (1896); *Wharton* v. *Wise,* 153 U.S. 155 (1894); *Virginia* v. *Tennessee,* 148 U.S. 503 (1893); *Kheel* v. *Port of New York Authority, supra; Union Branch R.R.* v. *East Tennessee & Ga. R.R.,* 14 Ga. 327, 340-41 (1853); *Dixie Wholesale Grocery, Inc.* v. *Martin,* 278 Ky. 705, *cert. denied,* 308 U.S. 609 (1939); *Ham* v. *Maine-New Hampshire*

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* As Judge Tyler said in *Kheel* v. *Port of New York Authority, supra,* 331 F.Supp. at 120: "Although the transit amendment, here at issue, was not involved in [*Port Authority Bondholders Protective Comm.* v. *Port of New York Authority*] or its predecessor, I view the disposition in *Courtesy Sandwich Shop* as predominately a legal one and, therefore, equally controlling of this case."

Interstate Bridge Authority, 92 N.H. 268 (1943); *Landes* v. *Landes*, 1 N.Y. 2d 358, 365, *appeal dismissed*, 352 U.S. 948 (1956); *Colgate-Palmolive Co.* v. *Dorgan*, 225 N.W. 2d 278 (N.D. 1974); *Town of Searsburg* v. *Town of Woodford*, 76 Vt. 370 (1904); Attorney General of New Jersey, *Formal Opinion* 1958 No. 9 (July 24, 1958) ("The rule today is that only those compacts and agreements which would aggrandize the political or sovereign power of a State or impede the realization of a national interest or responsibility need the consent of Congress for validity.")

Congress took care in its consents to the 1921 and 1922 Port Authority interstate agreements to reserve to itself the usual federal jurisdiction (42 U.S. Stat. 174, 822), thus expressly preserving its constitutional prerogatives, such as the power to regulate commerce, and thus protecting its real interest under the compact clause. In no way can the 1962 Covenant be construed as infringing on the rights of either states or the United States, which expressly reserved its jurisdiction.

CONCLUSION

The appeal should be dismissed on the ground that no substantial federal question has been raised.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1712

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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June 4, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

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v.

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Securities Industry Association through its Public Finance Council hereby respectfully moves for leave to file the accompanying *amicus curiae* brief in the above-described action in support of the jurisdictional statement filed by appellant, United States Trust Company of New York. The consent of counsel for the appellant has been

obtained. The consent of counsel for the appellees was requested but refused.

The interest of the Public Finance Council of the Securities Industry Association in this case arises from the fact that its members will be directly and substantially affected by the ultimate outcome of this litigation, as they have been already affected by the repeal of the 1962 Covenant and by the decision rendered in this case by the Superior Court of the State of New Jersey and affirmed by the Supreme Court of the State of New Jersey.

The Securities Industry Association is a trade association representing the leading firms and organizations whose business is the raising and allocation of capital moneys. Its members constitute a broad cross-section of the securities industry—investment bankers, brokers, dealers, underwriters, bond departments of banks, among others. The Public Finance Council of the Association has a vast wealth of collective experience in, familiarity with, and expertise with respect to the securities markets for obligations of state and local governments, a unique market.

The Public Finance Council is confident that appellant will adequately present the importance to Port Authority bondholders of this Court's decision on the constitutionality of repeal of the 1962 Covenant. However, the Public Finance Council is singularly able to present facts concerning the impact of the decision on the constitutionality of the repeal on the municipal bond market generally, on the borrowing ability of state and local governments which Council members represent as investment bankers, and on the general investing public. The Council respectfully submits that the general importance of the questions presented to this Court requires that such facts be presented by the Council as *amicus curiae*.

Although appellant's jurisdictional statement was served on May 21, 1976, the Public Finance Council did not learn until June 2nd that appellees intended to file a motion to dismiss the appeal herein. The Council has been advised that appellees have agreed to serve and file their motion to dismiss the appeal on Monday, June 7th, and that appellant has agreed to serve and file its response thereto within three or four days thereafter, so that this Court may consider the matter this Term. The Public Finance Council is serving and filing the within motion and brief on Monday, June 7th. Since the accompanying brief restricts itself to describing the importance of this appeal to the persons and entities enumerated above the Council respectfully submits that appellees should be able to file their objections to the within motion, if they so desire, within three or four days so that distribution and consideration of the jurisdictional statement and motion to dismiss will not be delayed.

June 4, 1976

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1975

No.

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF *AMICUS CURIAE*

The Securities Industry Association, through its Public Finance Council, respectfully submits this brief in support of the jurisdictional statement filed herein by appellant United States Trust Company of New York. This brief will not address itself to the legal issues considered in the jurisdictional statement, nor will it analyze the lower

court's decision. Rather, this brief will deal solely with the general importance of this case to the investing public and the members of the securities industry involved in the municipal bond market.

Interest of *Amicus Curiae*

The Securities Industry Association is a trade association representing the leading firms and organizations involved in the raising and allocation of capital moneys. The Association, through it Public Finance Council, is comprised of investment bankers, brokers, dealers, underwriters, and bond departments of banks, among others, who participate in the financing of tax-exempt obligations of states and local governments.

The decision on the constitutionality of the repeal of the 1962 covenant will have a direct and substantial impact on the general investing public and, perforce, on the securities industry generally.

Argument

The financing of tax exempt obligations includes the financing of obligations of states, cities, public authorities and other local governmental districts. In the past five years such issuers have issued from $23 billion to $29 billion of long-term debt in each year. Such financing encompasses a wide range of public purposes ranging from toll roads, bridges and airports to schools, fire engines and other essential governmental needs. The size of issues ranges from $10,000 to $1 billion. Although the market is diverse, it is based upon the reliance of prospective purchasers on the security offered by the issuers. Assurance of payment and continuation of the inviolability of the security for such payment are essential to a proper func-

tioning of the market. In turn, the continuation of an effective operation of state and local governments is dependent upon such issuers' access to capital moneys. Such access is dependent upon the continued integrity of the security and source of payment of such obligations, as well as the integrity of the pledges and contractual undertakings of the issuers made in connection with the issuance and sale of their obligations.

Over the years investment bankers and investors alike have believed that the legal strengths of state and local government financing have been properly based on (1) the rule that the statutes under which bonds are issued are an integral part of the bond contract and (2) the provision in Article I Section 10 of the Constitution of the United States that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." The repeal of the 1962 Covenant has constituted a challenge to the propriety of both of these beliefs, and thus constitutes a threat to the very foundations of municipal credit generally.

The 1962 Covenant was embodied in concurrent statutes adopted by the New Jersey and New York legislatures authorizing construction by the Port Authority of New York and New Jersey ("Port Authority") of the World Trade Center and providing for the take over of the Hudson-Manhattan Tubes, now PATH. Section 6 in each of the statutes includes the following: "The 2 States covenant and agree with each other and with the holders of any affected bonds . . ." that no pledged revenues shall be applied ". . . for any railroad purposes whatsoever other than permitted purposes. . . ." This covenant served to maintain the strong credit standing and the borrowing power of the Port Authority, by reassuring investors that assumption of PATH and its inevitable deficit did not constitute a precedent for other similar perpetual deficit projects. The solemn promises included in this covenant were relied upon by underwriters and investors in the purchase and sale of $1.2 billion bonds following its enactment.

For the entire investment community this covenant epitomized the security—an inviolate contract—essential to persuade investors that the bonds to be purchased were based on sound credit standards. The continuing integrity of such covenants is essential so that state and municipal governments may market their bonds successfully. The repeal of the 1962 Covenant was destructive of investor confidence and has had a severe impact on public credit. Accordingly, the ability of states and municipal governments to finance capital projects at reasonable rates is inextricably involved in this controversy. The controversy is not limited to the Port Authority or the two states involved, but involves the entire country. Final and decisive action by the United States Supreme Court is necessary to reassure the investing public that the hundreds of billions of dollars invested in state and local obligations are indeed protected by the impairment clause of the Federal Constitution.

Conclusion

The decision rendered by the Superior Court of the State of New Jersey which was affirmed by the Supreme Court of the State of New Jersey has already had an adverse effect upon the ability of states and local governments to raise necessary capital to meet their capital requirements. For this reason it is necessary that this Court note jurisdiction in this matter for final determination of the issues raised in

the courts below, and decide the issues so that the investment community may be able to properly evaluate the enforceability of the pledges and contractual undertakings contained in obligations of state and local governments.

Respectfully submitted,

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